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No. 10-(1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

WALTER MCGILL, PETITIONER,

v.

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS AND THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AN UNINCORPORATED ASSOCIATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Religious Freedom Restoration Act provides that the "government" may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the application of the burden to the person is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1.

The Act defines the term "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.* § 2000bb-2(1). Further, the Act provides that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." *Id.* § 2000bb-3(a).

The question presented is:

Whether the Religious Freedom Restoration Act applies to a private civil action under a federal statute in federal court, even when the United States is not a party to the action.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Walter McGill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit (App., *infra*, 1a-32a) is reported at 617 F.3d 402. An earlier decision of the district court is reported at 624 F. Supp. 2d 883. The opinion of the district court entering a finding of contempt (App., *infra*, 33a-36a) is not reported but is available at 2010 WL 99404.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on August 10, 2010.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Religious Freedom Restoration Act is set forth at App., *infra,* 37a-40a.

INTRODUCTION

The court of appeals weighed in on a circuit split regarding the proper interpretation of the Religious Freedom Restoration Act (RFRA). The recurring question that has now evenly divided six circuits is whether RFRA has any application to civil actions between private parties in federal court applying

federal law. The issue arises in varied circumstances, including intellectual property disputes, employment discrimination claims, and bankruptcy proceedings.

The better view is that RFRA offers a defense to all federal laws, including federal laws that are enforced by private parties in civil actions in federal court. That is so because the burden on the individual's exercise of religion is no less caused by the government because it results from a private federal cause of action resolved by a federal court than through direct government enforcement. That is the view followed by the Second, Eighth, and D.C. Circuits. And that view is supported by the text and history of RFRA.

The court below, by contrast, incorrectly held that RFRA had no application to this civil suit regarding whether federal law and federal courts could prohibit petitioner from using the term "Seventh-day Adventist" in the name of his church. The failure to apply RFRA's statutorily-mandated strict scrutiny was error that warrants this Court's review.

STATEMENT OF THE CASE

A. Statutory Framework

1. The Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, was a response to this Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). Congress explained, in the express statutory findings accompanying RFRA,

that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Congress found, however, that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(2).

Congress thus articulated two purposes in enacting RFRA. First, "to guarantee" the application of the "compelling interest test" in "all cases where free exercise of religion is substantially burdened." *Id.* § 2000bb(b)(1). And second, "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* § 2000bb(b)(2).

To fulfill these purposes, Congress provided that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the application of the burden to the person is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1(a) & (b)(2). A person may assert a violation of RFRA "as a claim or defense in a judicial proceeding" and may "obtain relief against a government." *Id.* § 2000bb-1(c).

As originally enacted, RFRA defined "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." It provided that RFRA applied "to all

Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act."

2. This Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that RFRA was not constitutional as applied to State and local governments because it exceeded Congress's enumerated powers under the Fourteenth Amendment. The lower courts subsequently held that RFRA was still valid as applied to the federal government and federal territories and possessions. *See, e.g.*, *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854 (8th Cir.), cert. denied, 525 U.S. 811 (1998).

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc et seq.). Unlike RFRA's broad application to "all" state law, RLUIPA targeted specific state and local practices that Congress believed were particularly burdensome to religious exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005). Congress did so under its authority under the Spending and Commerce Clauses and the Fourteenth Amendment. *Id.* at 715.

In addition, RLUIPA amended RFRA in three ways. First, it amended the definition of "government" in Section 2000bb-2 of RFRA to remove reference to States and their subdivisions, and to add references to the District of Columbia, Puerto Rico and federal territories. Second, RLUIPA removed the

reference to "State law" in Section 2000bb-3(a) of RFRA. And third, RLUIPA amended the definition of "exercise of religion" in Section 2000bb-2(4) of RFRA to incorporate a new, more expansive definition of the term adopted in Section 2000cc-5(7) of RLUIPA.

B. Factual Background

1. Petitioner was the founder and pastor of a church in Guys, Tennessee, that he named "A Creation Seventh Day & Adventist Church," and which is part of a worldwide body he named "The Creation Seventh Day & Adventist Church." Petitioner named the church based on a divine revelation. App., *infra*, 5a-6a; Dt. Ct. Dkt. 30, Exh. A at 2.

Petitioner has also created internet domain names, including "creation-7th-dayadventist-church.org," "creationseventhday-adventistchurch.org," "creations da.org," and "csda.us." App., *infra*, 6a.

Respondent General Conference of Seventh-day Adventists was formed in 1863. Since the official formation of the church, the names "Seventh-day Adventist" and "SDA" have been used by the Seventh-day Adventist Church. Respondent General Conference Corporation of Seventh-day Adventists holds title to all of the church's assets. It has registered the marks "Seventh-day Adventist," "Adventist," and "General Conference of Seventh-day Adventists," with the United States Patent and Trademark Office. Respondents have not granted petitioner any licenses to use their marks. App., *infra*, 5a-6a.

2. Respondents filed a complaint against petitioner in federal district court alleging trademark infringement, unfair competition, and dilution of marks under the federal Lanham Act, 15 U.S.C. §§ 1114, 1125(a), 1125(c); cybersquatting under 15 U.S.C. § 1125(d)(1); as well as parallel Tennessee state law claims. App., *infra*, 6a-7a.

Respondents asked the district court to enter an injunction prohibiting petitioner from using the marks, delivering to the Clerk of the Court all infringing materials for destruction, and transferring all petitioner's internet domain names to respondents. Dt. Ct. Dkt. 1 at 18-19. In addition, respondents asked the district court to award actual and statutory damages as well as attorneys' fees and costs. *Id.* at 19.

Petitioner moved to dismiss the claims on the ground that, *inter alia*, RFRA barred application of federal law in a way that substantially burdened his exercise of religion. The district court denied this portion of petitioner's motion to dismiss on the ground that petitioner had waived the RFRA defense by failing to raise it in his answer. App., *infra*, 7a.

The district court subsequently granted respondents' summary judgment on their infringement claims with respect to "Seventh-day Adventist," but denied summary judgment with respect to "Adventist" and "SDA." App., *infra*, 7a-8a.

Prior to any further proceedings on the merits, the district court referred the case to a magistrate judge for purposes of mediation after counsel had

agreed to mediate. Petitioner then filed a motion to amend the pretrial order to remove the mediation requirement because his "religious convictions will not allow him to compromise his faith." App., *infra*, 8a. The district court denied petitioner's motion to amend. App., *infra*, 8a-9a.

After petitioner refused to participate in mediation, the district court granted respondents' motion for a default judgment. App., *infra*, 9a. It entered an injunction that prohibited petitioner from "using the mark SEVENTH-DAY ADVENTIST, including the use of the words SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as part of, or in combination with any other words, phrases, acronyms or designs * * * in the sale, offering for sale, distribution, promotion, provision or advertising of any products and services, and including on the Internet." Dt. Ct. Dkt. 98 at 12 n.9. The injunction required petitioner to deliver any infringing "labels, signs, prints, packages, wrappers, receptacles, and advertisements" to respondents or permanently dispose of them himself. *Id.* at 13 n.9.

The injunction stated that "[s]ubject to the foregoing," petitioner could "use these terms in a non-trademark sense." *Ibid.* The injunction gave examples of such permitted uses: "oral or written use of the marks to refer to the [respondents]" or "oral or written use of certain terms in a non-trademark descriptive sense, such as 'this Church honors the Sabbath on the "seventh day,"' or 'the members of this church believe in the "advent" of Christ.'" *Ibid.*

3. The court of appeals affirmed. App., *infra*, 1a-32a. The court addressed the applicability of RFRA because it determined that the default judgment did not preclude review of whether the motion to dismiss should have been granted. App., *infra*, 10a.

The court of appeals held that "RFRA would appear to trigger strict scrutiny in this case." App., *infra*, 16a. It explained that to trigger strict scrutiny, a party must show a governmental action that "(1) substantially burden[s], (2) a religious belief rather than a philosophy or way of life, (3) which belief is sincerely held." App., *infra*, 16a. The court noted that "no one has questioned the sincerity of [petitioner's] belief that God requires him to continue his infringing use of the plaintiffs' marks." The court also acknowledged that "[b]eing compelled to stop could substantially burden his religious practice." App., *infra*, 16a.

The court of appeals held, nonetheless, that petitioner "cannot claim the benefit of RFRA" because "the defense does not apply in suits between private parties." App., *infra*, 17a. The court relied almost exclusively on the dissenting opinion by then-Judge Sotomayor in *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006). App., *infra*, 17a-19a.

The court of appeals expressly refused to "follow the *Hankins* majority" that "found RFRA's language broad enough to apply 'to an action by a private party seeking relief under a federal statute against another private party who claims that the federal statute

substantially burdens his or her exercise of religion.'" App., *infra*, 19a (quoting *Hankins*, 441 F.3d at 103).

Because the court of appeals ruled against petitioner's RFRA claim on that threshold ground, it did not decide whether the district court erred in finding that RFRA was an affirmative defense that had to be raised in his answer to the complaint. App., *infra*, 17a n.3.

The court of appeals then held that, absent RFRA's application, summary judgment was properly entered for respondents under the Lanham Act with regard to the "Seventh-day Adventist" mark. App., *infra*, 27a-32a.

4. While the case was on appeal, respondents sought to enforce the injunction against petitioner. The district court found that petitioner had willfully failed to abide by the injunction by, *inter alia*, using signs and promotional materials that used respondents' marks. App., *infra*, 34a.

The district court thus authorized respondents and their agents "to remove and permanently dispose of [petitioner's] signs and promotional materials that violate the Injunction Order." App., *infra*, 36a. Respondents' agents removed the church signs and other infringing materials from petitioner's church on

February 16, 2010, Dt. Ct. Dkt. 136 at 6, and again on October 6, 2010, Dt. Ct. Dkt. 148 at 4.[1]

Respondents believe they possess the "ongoing authority to remove and permanently dispose of [petitioner's] signs and promotional materials that violate the Injunction Order" based on the "standing authority of the prior Orders of the Court." Dt. Ct. Dkt. 148 at 4 n.1.

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY BECAUSE SIX COURTS OF APPEALS ARE EVENLY DIVIDED AS TO WHETHER ALL PRIVATE LITIGATION APPLYING FEDERAL LAW IN FEDERAL COURTS IS EXCLUDED FROM RFRA'S SCOPE

A. The Ruling Below Joins One Side Of A Circuit Split Regarding RFRA's Application That Will Not Be Resolved Absent This Court's Review

There is now a 3-to-3 circuit split on the question presented. Contrary to the decision below, the Second, Eighth, and D.C. Circuits have held that RFRA creates a defense in private civil litigation

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[1] Currently pending before the district court is a report and recommendation by a magistrate judge that petitioner be found in contempt for encouraging another person to restore the signs to the church, as well as for failing to comply with discovery requests. Dt. Ct. Dkt. 136 at 6, 8. Petitioner himself is currently in Africa doing mission work. *Id.* at 3.

involving federal law. The Sixth Circuit acknowledged that this was an issue that had divided the courts of appeals (App., *infra*, 19a), and joined the views of the Fifth and Seventh Circuits. The Ninth Circuit has expressed doubts about RFRA's applicability to private civil actions, but twice avoided resolving the issue. This Court's review is necessary so that RFRA's broad protections are uniformly available nationwide.

1. In *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006), the Second Circuit held (over a dissent from then-Judge Sotomayor) that RFRA applied in a private suit brought by a minister who sued his church regarding his compulsory retirement under the federal Age Discrimination in Employment Act (ADEA).

The majority in *Hankins* explained that RFRA's statutory text provides that it applies to "all federal law, and the implementation of that law" and permits a defendant to assert a violation of RFRA "as a defense in a judicial proceeding." *Id.* at 103 (quoting 42 U.S.C. §§ 2000bb-3(a), 2000bb-1(c)). This broad language "easily covered" the case before the court, the majority held. *Ibid.* The court held that the "only conceivably narrowing language"—which prescribed that a litigant could "obtain appropriate relief against a government"—was best read as broadening the remedies of the statute. *Ibid.* The majority held that RFRA applied to all litigation in which federal law substantially burdened the exercise of religion, not

merely that litigation in which the government was a party. *Ibid.*[2]

The Eighth Circuit also has held that RFRA applies in a case in which the United States was not a party. *See Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1416-1417 (8th Cir. 1996), vacated, 521 U.S. 1114 (1997), reinstated, 141 F.3d 854 (8th Cir.), cert. denied, 525 U.S. 811 (1998). The court explained that "[t]he bankruptcy code is federal law, the federal courts are a branch of the United States, and [the court's] decision would involve the implementation of federal bankruptcy law." *Id.* at 1417. It thus held that a federal court's implementation of federal law falls within the ambit of "government" as defined by RFRA, rendering the statute applicable. *Ibid.* More broadly, the Eighth Circuit held that RFRA must be interpreted as amending all federal law, "engraft[ing] [an] additional clause to [the Bankruptcy Code] that a recovery that places a substantial burden on a debtor's exercise of religion will not be allowed" unless it satisfies the

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[2] *Hankins* remains the law in the Second Circuit. The Sixth Circuit noted (App., *infra*, 20a) that in a subsequent case a different panel of the Second Circuit expressed a preference for the views of the dissent in *Hankins*. *See Rweyemamu v. Cote*, 520 F.3d 198, 204 (2d Cir. 2008). But that decision did not and could not have overturned *Hankins*. *See United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.) (panel bound by prior panel decision unless overruled en banc or by Supreme Court), cert. denied, 543 U.S. 908 (2004).

exception provided by RFRA. *In re Young*, 141 F.3d at 861.

The D.C. Circuit also applied RFRA to bar a private plaintiff's federal action in *EEOC v. Catholic University of America*, 83 F.3d 455, 467-470 (D.C. Cir. 1996). That appeal arose from two actions—one brought by a private plaintiff and one brought by the EEOC. By applying RFRA to bar the private plaintiff's claims as well as the EEOC's, the D.C. Circuit effectively held that RFRA applies to private parties.

2. The Seventh Circuit, by contrast, has held that RFRA does not apply to suits between purely private parties and rejected the *Hankins* decision. *See Tomic v. Catholic Diocese of Peoria,* 442 F.3d 1036 (7th Cir.), cert. denied, 549 U.S. 881 (2006). Citing the use of the word "government" in RFRA, Judge Posner summarily concluded: "The decision [*Hankins*] is unsound. RFRA is applicable only to suits to which the government is a party." *Id.* at 1042.

Likewise, the Fifth Circuit, in an unpublished opinion, affirmed a published district court decision holding that RFRA does not apply to private parties. *Boggan v. Mississippi Conference of the United Methodist Church*, 433 F. Supp. 2d 762 (S.D. Miss. 2006), aff'd, 222 Fed. App'x 352 (5th Cir.), cert. denied, 552 U.S. 813 (2007).

3. Finally, in this case, the Sixth Circuit relied on two Ninth Circuit cases that further demonstrate the need for this Court's review. App., *infra*, 20a.

In *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 837-838 (9th Cir. 1999), the Ninth Circuit merely held that the defendant hospital was not acting under "color of law" when it refused to hire a plaintiff who would not provide his social security number to the hospital as federal law required.

Subsequently, the Ninth Circuit declined to resolve the "knotty question" whether RFRA applied to private litigation. It simply assumed it did and held that the defendant had not demonstrated a substantial burden on its exercise of religion. The court noted, however, that "[i]t seems unlikely that the government action Congress envisioned in adopting RFRA included the protection of intellectual property rights against unauthorized appropriation." *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000), cert. denied, 532 U.S. 958 (2001).

The division in the courts of appeals is mature, recurring and widespread. No appellate court that has decided the question presented has switched sides, and there are reasoned rulings on both sides of the conflict. There is no reason to believe that this conflict can be resolved absent this Court's review. On that basis alone, certiorari should be granted.

B. The Decision Below Contravenes RFRA's Text And The History Of Its 2000 Amendments

The Court also should grant review because the ruling below cannot be reconciled with RFRA's text and history.

1. RFRA's broad text demonstrates its applicability to all private civil actions in federal court

a. By its plain language, RFRA applies to "all Federal law." 42 U.S.C. § 2000bb-1. By using such expansive text, RFRA is best understood as an amendment to the "*entire* United States Code" to prohibit unwarranted substantial burdens on the exercise of religion. *Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008) (emphasis added); *see also In re Young*, 141 F.3d at 856; *Worldwide Church of God*, 227 F.3d at 1120; *Catholic Univ. of Am.*, 83 F.3d at 468. RFRA therefore amended every federal statute creating private causes of action, including the Lanham Act, to limit their applicability in cases where a significant burden is placed on the exercise of religion. Had Congress intended to cabin RFRA like the ruling below, it would have drafted the statute to apply only to "all Federal law in cases where the United States is a party."

b. RFRA's definition of "government" as including a "branch" of the United States, 42 U.S.C. § 2000bb-2(1), further demonstrates that RFRA applies to private civil actions brought in federal

court. The term "branch" of the United States unambiguously includes the federal courts. BLACK'S LAW DICTIONARY 864 (8th ed., 1st reprint 2004) (defining "judiciary" as that "branch of government responsible for interpreting the laws and administering justice"). Indeed, the United States has urged the same reading of RFRA. It argued that "a ruling by this Court itself concerning applicability of [the bankruptcy provision] would constitute 'implementation' of that law [by a government], since RFRA applies to all branches and units of federal, state, and local government." U.S. Brief as Intervenor at 29, *In re Young*, 82 F.3d 1407 (8th Cir. 1996) (No. 93-2267). The Eighth Circuit reached the same conclusion on this point. *In re Young*, 82 F.3d at 1416-1417.[3]

RFRA's definition of "government" as including a "person acting under color of law" likewise demonstrates RFRA's application to civil litigation. A federal judge is plainly acting under color of law. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (judge "beyond all question is a state actor"). And, at many stages of a civil action, a private litigant may also act "under color of law." *See, e.g., id.* at

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[3] The United States ultimately withdrew its appellate brief in that case (which urged that RFRA applied but that the religious claimant should lose) because the President did not believe it was supportive enough of the religious claimant. *In re Young*, 82 F.3d at 1413; Drew S. Days, III, *When the President Says 'No': A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC. & PROCESS 509, 517-518 (2001).

623-628 (jury selection); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982) ("invoking the aid of state officials to take advantage of state-created attachment procedures").[4]

c. Moreover, Congress intended RFRA to mimic the scope of the Free Exercise Clause, which applies in civil litigation where the government is not a party because courts are part of the government. *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (First Amendment applies to state law governing private tort actions).

RFRA's preambulatory findings and statement of purpose made clear that Congress intended to supplement the Free Exercise Clause (as interpreted by this Court in *Smith*) by applying the "compelling interest test" in "*all* cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (emphasis added). Indeed, in holding RFRA unconstitutional as applied to state and local governments, this Court explained:

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[4] In this case, for example, respondents claim that the district court gave them the "ongoing authority" to enter petitioner's church "to remove and permanently dispose of [petitioner's] signs and promotional materials that violate the Injunction Order." Dt. Ct. Dkt. 148 at 4 n.1.

> Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. * * * Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

d. Nor does the fact that Section 2000bb-1(b) imposes the obligation on the "government [to] demonstrate * * * that the application of the burden" is the least restrictive means of furthering a compelling governmental interest counsel against the application of RFRA to this case. App., *infra*, 18a-19a.

There is nothing unusual about a private party being required to prove that a statute satisfies heightened scrutiny. For example, RFRA authorizes individuals to bring RFRA claims seeking appropriate relief from "official[s]" and "other person[s] acting under color of law." 42 U.S.C. § 2000bb-2(1). That authorization encompasses suits against federal officials in their individual capacities for money damages. *See Availability of Money Damages under the Religious Freedom Restoration Act*, 18 Op. O.L.C. 180, 182-183 (1994). In those suits, the federal government is not a necessary party and the Department of Justice may not represent the named individual. In such instances, a private individual must demonstrate that the substantial burden on religion

was justified by a compelling interest and was narrowly tailored to that interest.

Indeed, private parties often have been called on to demonstrate that a statute is narrowly tailored and furthers a compelling government interest. *See, e.g., Boy Scouts of America v. Dale,* 530 U.S. 640 (2000) (in private suit under state law that involved burden on First Amendment right to associate, Court addressed State's compelling interest even in absence of State as party); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (same); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (in custody suit between private parties in which state court considered race, Court applied strict scrutiny even in the absence of State as a party).[5]

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[5] That was, moreover, precisely what Congress expected would happen. *See* 145 Cong. Rec. H5590 (daily ed. July 15, 1999) (statement of Rep. Conyers) (federal law "would require individuals proceeding under such State and local antidiscrimination law to prove that the law they wish to utilize is a least restrictive means of furthering a compelling governmental interest"); *see also Religious Liberty: Hearing Before the S. Judiciary Comm.,* 106th Cong. 155, 163 (1999) (in response to questions on this point, Gene C. Schaerr and Chai Feldblum both noted that the burden would initially fall on private plaintiffs but that relevant government agencies and interest groups could intervene to defend the law if needed).

2. The ruling below is contrary to RFRA and its amendment's legislative history

Review is also warranted because the ruling below cannot be reconciled with RFRA's legislative history.

RFRA was enacted against the backdrop of private litigation burdening the exercise of religious freedom. Many of the problems Congress heard about prior to enacting RFRA involved civil litigation between private parties. In enacting the original statute, Congress relied on a Congressional Research Service report that cited a number of examples, including a private wrongful death suit in which a Jehovah's Witness's decision to refuse blood transfusions was relied on to avoid liability; a private discrimination suit against the Boy Scouts under a public accommodations law; a private suit to enforce the Age Discrimination in Employment Act; a private suit by an associate pastor against a church for wrongful termination; and a private suit by Planned Parenthood against an anti-abortion activist. *See* David Ackerman, Congressional Research Serv., Library of Congress, *The Religious Freedom Restoration Act and*

the Religious Freedom Act: A Legal Analysis 14-17 (1992).[6]

Moreover, after this Court held in *City of Boerne* that RFRA was unconstitutional as applied to state and local governments, Congress again considered whether the compelling interest standard should apply to States and localities in a proposed act called the Religious Liberty Protection Act (RLPA), which would have also amended RFRA.

Opposition arose on the ground that the compelling interest standard would be used to challenge the application of anti-discrimination laws in employment, housing, and public accommodation—all of which were enforceable through private civil actions. Because RLPA would, like RFRA, "authorize[ ] individuals to raise a religious liberty affirmative defense in any judicial proceeding," the defense "could be asserted against federal civil rights plaintiffs in cases concerning disability, sexual orientation, familial status and pregnancy." H.R. Rep. No. 106-219, at 38 (1999) (dissenting views). And opponents to RLPA noted that RFRA had previously been applied to private

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[6] Extensive hearing testimony provided further examples before Congress. *See, e.g., Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil & Const. Rights of the H. Comm. on the Judiciary*, 102d Cong. 363-369 (1992) (testimony regarding private civil litigation where Free Exercise claim was raised and where RFRA would apply a different test); *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. on Judiciary*, 102d Cong. 52-55, 65, 158-159 (1992) (same).

civil actions. *See Religious Liberty: Hearing Before the Senate Judiciary Comm.*, 106th Cong. 68 (1999) (statement of Sen. Leahy) (discussing court's reliance on RFRA in child support dispute in *Hunt v. Hunt*, 648 A.2d 843 (Vt. 1994)); 145 Cong. Rec. H5591 (daily ed. July 15, 1999) (statement of Rep. Conyers) (warning that passage of RLPA would permit reliance on statutory religious liberty defense in private actions for child support, wrongful death, and civil discovery requests).

Supporters likewise understood that RLPA would extend to private civil actions. The House Report gave the examples of private "litigants attempting to discover sacred confessional information for use in civil lawsuits" as "instances where government action thwarts the fulfillment of religious sacraments." H.R. Rep. No. 106-219, at 9; *see also* 145 Cong. Rec. H5588 (daily ed. July 15, 1999) (statement of Rep. Canady) ("While RFRA was on the books, successful claimants included * * * the Catholic University of America, which was sued for gender discrimination by a canon-law professor denied tenure.").

In the end, Congress did not enact RLPA but enacted RLUIPA, which targeted state and local land use and treatment of prisoners. But at the same time, Congress did not reduce RFRA's breadth as applied to the federal government. Instead, Congress amended RFRA to remove its references to States in order to "clarif[y] that RFRA applies to federal law, policies, property, and employees." H.R. Rep. No. 106-219, at 13 n.48. It did nothing to restrict the RFRA's

scope, which had, to that point, consistently been applied broadly to encompass private civil actions.

C. The Sixth Circuit's Holding Addresses An Issue Of Continuing Importance And This Case Presents The Issue In An Ideal Posture

1. The Court should review and reverse the Sixth Circuit's decision because it affects a broad swath of law.

The question presented arises in numerous contexts on a regular basis in federal court where the government plays limited, if any, enforcement role in civil litigation. As in the present case, it can arise in cases involving intellectual property. *See Worldwide Church of God*, 227 F.3d at 1121 (copyright); *Urantia Found. v. Maaherra*, 895 F. Supp. 1335 (D. Ariz. 1995) (copyright and trademark).

It also comes up in the bankruptcy context, where efforts by creditors to recover funds the debtor gave a religious entity or to force the debtor to sell religious property to pay debts substantially burdens the debtors' exercise of religion. *See, e.g.*, *Tort Claimants Comm. v. Roman Catholic Archbishop of Portland (In re Roman Catholic Archbishop of Portland)*, 335 B.R. 842 (Bankr. D. Or. 2005); *Watson v. Boyajian*, 309 B.R. 652 (B.A.P. 1st Cir. 2004).

And private suits for employment discrimination against religious employers also arise on a regular

basis. *See Redhead v. Conference of Seventh-day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006) (pregnancy discrimination); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849 (S.D. Ind. 1998) (age discrimination); *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994) (age discrimination); *see also Intermountain Fair Housing Council v. Boise Rescue Mission*, No. CV-08-205, 2010 WL 1913379 (D. Idaho May 12, 2010) (claim of sex discrimination by religious organization under Fair Housing Act).

The interpretation of RFRA also has consequences for state law. Since *Boerne*, thirteen States have enacted provisions virtually identical to RFRA to govern their own laws and practices. *See Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 261 n.47 (3d Cir. 2008) (collecting laws). State courts, in turn, have looked to the federal courts' interpretation of the federal RFRA in giving content to these state laws. *See, e.g., Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) ("Because TRFRA, RFRA, and RLUIPA were all enacted in response to *Smith* and were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute."); *Diggs v. Snyder*, 775 N.E.2d 40, 44 (Ill. App. Ct. 2002) ("[w]e may therefore turn to federal cases for guidance"); *In re Multi-Circuit Episcopal Church Prop. Litig.*, 76 Va. Cir. 873, 879 (2008)

(looking to the federal RFRA as persuasive). These decisions further demonstrate the importance of definitively resolving RFRA's applicability to private litigation.

2. This case presents the ideal vehicle to address an issue that has divided the courts. As the court of appeals recognized, petitioner plainly has sincerely-held religious beliefs. App., *infra*, 16a. Further, the issue is properly preserved, having been both pressed by petitioner at every stage and passed on below.

Finally, the issue is purely one of statutory construction regarding the scope of RFRA's coverage. If the Sixth Circuit is reversed on that threshold question, the case will have to be remanded for further proceedings on whether petitioner has established a prima facie case under RFRA and, if so, whether the application of the Lanham Act to petitioner comports with strict scrutiny.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 8, 2010

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS and GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, an Unincorporated Association, *Plaintiffs-Appellees,*	No. 09-5723
v.	
WALTER MCGILL, d/b/a CREATION 7TH DAY ADVENTIST CHURCH et al., *Defendant-Appellant.*	

Appeal from the United States District Court
for the Western District of Tennessee at Jackson.
No. 06-01207 – J. Daniel Breen, District Judge.

Argued: March 11, 2010

Decided and Filed: August 10, 2010

Before: KENNEDY, MOORE, and
SUTTON, Circuit Judges.

COUNSEL

ARGUED: Charles L. Holliday, SPRAGINS, BARNETT & COBB, PLC, Jackson, Tennessee, for

Appellant. Joel T. Galanter, ADAMS AND REESE LLP, Nashville, Tennessee, for Appellees. **ON BRIEF:** Charles L. Holliday, SPRAGINS, BARNETT & COBB, PLC, Jackson, Tennessee, for Appellant. Joel T. Galanter, ADAMS AND REESE LLP, Nashville, Tennessee, Emily C. Taube, ADAMS AND REESE LLP, Memphis, Tennessee, for Appellees.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiffs General Conference Corporation of Seventh-day Adventists ("General Conference Corporation") and General Conference of Seventh-day Adventists ("General Conference") sued Walter McGill for trademark infringement based on McGill's use of their protected marks in advertising and promoting his breakaway church. McGill brought a motion to dismiss based on the Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA"), which the district court denied. The district court later granted partial summary judgment for the plaintiffs. After McGill's repeated refusal to appear for a court-ordered mediation to which he had initially consented, the district court entered default judgment against him. He now appeals. For the reasons discussed below, we **AFFIRM**.

I. BACKGROUND

The district court discussed the relevant background of the litigation:

> General Conference Corporation of Seventh-day Adventists . . . is a corporation whose principal place of business is located in Maryland. ([Docket Entry ("D.E.")] No. 37, Pls.' Statement of Undisputed Facts ¶ 9.) The other Plaintiff, General Conference of Seventh-day Adventists . . . is an unincorporated association that represents the interests of the Seventh-day Adventist Church. (*Id.* ¶ 10.) The General Conference was formed in 1863, marking the official organization of the Seventh-day Adventist Church. (D.E. No. 21, George W. Reid ThD's Expert Report ¶ 13.) The church grew out of several congregations that believed that Christ's Second Advent was imminent and that the Sabbath should be observed on the seventh day of the week. (*Id.* ¶ 1.) The Plaintiffs' expert, George Reid ThD, asserts that none of these early churches called themselves "Seventh-day Adventist" and that it was not until the congregations came together to create a formal church structure that the name "Seventh-day Adventist" was chosen. (*Id.* ¶¶ 8-10.) Since the official formation of the church, the names "Seventh-day Adventist" and "SDA" have been used by the Seventh-day Adventist Church as the church's name, and as its trade name in advertising and publishing. (D.E. No. 37, Pls.' Statement of Undisputed Facts ¶ 40.) The church today

has approximately 968,604 members in the United States, as well as 3,529 ministers and 5,316 congregations. (*Id.* ¶ 44.) Worldwide, it has over fourteen million members, 16,892 ministers, and 121,625 congregations. (*Id.*)

The Corporation holds title to all of the church's assets. (D.E. No. 37, Pls.' Statement of Undisputed Facts ¶ 11.) It has registered the marks "Seventh-day Adventist," "Adventist," and "General Conference of Seventh-day Adventists," with the United States Patent and Trademark Office. (*Id.* ¶¶ 17-23.) Registration number 1,177,185 protects the use of the "Seventh-day Adventist" mark on religious books, magazines, pamphlets, newsletters, brochures, encyclopedias, dictionaries, commentaries, fliers, bulletins, yearbooks, booklets, and bibles. (*Id.* ¶ 25.) It also protects its use for the establishment and administration of employee health care and benefit programs and medical insurance programs, as well as educational instruction services at the grade school, high school, and college level, and for film production and distribution services, health care services, and religious observances and missionary services. (*Id.*) Registration numbers 1,176,153 and 1,218,657 protect[ ] the "Advent[ist]" mark for the same purposes. (*Id.* ¶¶ 26-27.) Registration number 1,171,760 protects the "General Conference of Seventh-day Adventists"

mark for church services. (*Id.* ¶ 28.)[1] "SDA" is an acronym for "Seventh-day Adventist" that has not been registered. (*Id.* ¶ 36.) The Plaintiffs assert that they are "legally equivalent terms," however, and that "SDA" has been used by the General Conference from 1863 onwards "as part of the corporate name, the trade name, in advertising, in publishing and publications, and in the performance of services." (*Id.* ¶¶ 40-41.)

The Defendant is the pastor of a church he currently calls "A Creation Seventh Day & Adventist Church," (D.E. No. 37 Ex. 2 to Pls.' Statement of Undisputed Facts, Dep. of Walter McGill, at 5), although in his Answer to the Complaint he referred to it as the "Creation Seventh Day Adventist Church," (D.E. No. 4, Answer, at 1). His church has three members. (D.E. No. 37 Ex. 2 to Pls.' Statement of Undisputed Facts, Dep. of Walter McGill, at 7.) There is a second three-member church associated with his, which has the same name and is located in British Columbia, Canada. (*Id.* at 8-9.) In addition, there are other congregations that the Defendant "raised up" in the United States, which have been apostatized, or diverted from the faith. (*Id.* at 9.)

McGill was originally baptized in a Seventh Day Adventist church affiliated with

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[1] The plaintiffs do not allege that McGill infringed the trademark for "General Conference of Seventh-day Adventists."

> the Plaintiffs. (*Id.* at 16.) After several years, however, the Defendant decided to separate from the church because of a theological dispute (*Id.* at 18.) In 1990, McGill formed his current church, taking its name from a divine revelation. (*Id.* at 34, 37.) While the Defendant was aware that the Plaintiffs had trademarked the name "Seventh Day Adventist," he used it anyway, because he believed that he was divinely mandated to do so. (*Id.* at 40.) McGill has also created the following internet domain names, among others: "7th-day-adventist.org," "creation-7th-day adventist-church.org," "creationseventhday-adventistchurch.org," "creationsda.org," and "csda.us." (D.E. No. 37, Pls.' Statement of Undisputed Facts ¶¶ 13-14.) The Plaintiffs have not granted him any licenses to use their marks. (*Id.* ¶ 33.)

Gen. Conference Corp. of Seventh-day Adventists v. McGill, 624 F. Supp. 2d 883, 888-90 (W.D. Tenn. 2008).

On September 22, 2006, the plaintiffs filed a complaint in federal district court alleging trademark infringement, unfair competition, and dilution of marks under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a), 1125(c); cybersquatting under 15 U.S.C. § 1125(d)(1); unfair and deceptive trade practices under the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101; common law trademark infringement and unfair competition; and injury to business reputation and dilution of marks under Tenn. Code Ann.

§ 47-25-513. McGill filed an answer on October 17, 2006, raising as affirmative defenses the First Amendment, the Commerce Clause, laches, fair use, failure to state a claim, the fact that the trademarked terms are generic and that his use of similar terms do not cause confusion, and the assertion that the plaintiffs had lost their right to trademark protection "by deviation of doctrine from the religion of Seventh Day Adventism as it was originally formed." Answer ¶¶ 71-78 (Dist. Ct. Dkt. Doc. 4).

On September 26, 2007, McGill filed a motion to dismiss. Therein, he argued that the court lacked subject matter jurisdiction because it could not decide the intellectual-property issue without resolving an underlying dispute over religious doctrine. He also argued that the plaintiffs had failed to state a claim because RFRA renders trademark law inapplicable to him and because "Seventh-Day Adventism" is a religion and thus inherently generic and incapable of being trademarked. The district court denied the motion in full on May 5, 2008. It held that trademark law was applicable despite the Free Exercise Clause, that McGill had waived the RFRA defense by failing to raise it in his answer, and that whether the trademarked terms are generic is a factual issue that could not be resolved on a motion to dismiss.

On October 31, 2007, the plaintiffs moved for summary judgment. On June 11, 2008, the district court granted the motion in part and denied it in part. The court determined that the trademarks for "Seventh-day Adventist" and "Adventist" had become

"incontestable" under 15 U.S.C. § 1065, meaning that they are presumptively valid and that McGill had the burden of showing otherwise. The court concluded that McGill could not overcome the presumption as to "Seventh-day Adventist," but that there was a genuine issue of material fact as to the genericness of "Adventist." The court further found that the plaintiffs bore the burden of establishing the validity of their "SDA" mark but were not entitled to summary judgment on this point. The court then found that the plaintiffs had established that McGill's use of their marks was likely to cause confusion among the relevant audience. Finally, the district court rejected all the defenses that McGill raised in his answer. In sum, the district court granted the plaintiffs summary judgment on their infringement claims with respect to "Seventh-day Adventist" but denied it with respect to "Adventist" and "SDA."

During a May 30, 2008 telephone status conference, the parties agreed to mediate. The district judge referred the case to a magistrate judge, who on June 3, 2008 (a week before the summary-judgment order issued) scheduled the mediation for July 15, 2008. Shortly before that date, McGill's lawyer indicated that McGill would not attend the mediation. On July 24, 2008, McGill's lawyer filed a motion to amend the pretrial order to remove the mediation requirement because McGill's "religious convictions will not allow him to compromise his faith." Mot. to Amend at 2 (Doc. 71). That same day, McGill's lawyer moved to withdraw. The district court granted the motion to

withdraw and denied McGill's motion to amend, ordering the parties to reset the mediation and warning that failure to attend could result in dismissal or default judgment. The parties conferred with the magistrate judge's office. New counsel for McGill indicated that McGill would not attend or allow counsel to attend. The plaintiffs requested a status conference, which was held on August 26, 2008. The district court again ordered the parties to schedule mediation and to certify to the court that they would attend. The parties scheduled the mediation for October 2, 2008. On September 4, 2008, the plaintiffs filed a certification expressing their intent to attend the conference, and defense counsel filed a certification indicating that McGill would *not* attend. The magistrate judge cancelled the mediation, and the plaintiffs moved for default judgment due to McGill's repeated violation of the court's order. On May 28, 2009, the district judge granted the motion. *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, No. 06-cv-1207, 2009 WL 1505738 (W.D. Tenn. May 28, 2009).

McGill then filed a notice of appeal and a motion to stay the district court's injunction against his continued use of the marks in his promotional materials. The district court denied McGill's motion to stay and entered judgment.

II. ANALYSIS

McGill appeals the denial of his motion to dismiss, the grant of partial summary judgment to the plaintiffs, and the entry of default judgment against him. As the plaintiffs point out, although McGill appealed the default-judgment order, he did not present argument regarding that order in his brief and has thus waived any argument that the order should not have been entered. *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005). The failure to challenge the default-judgment order, however, does not end our inquiry. A default judgment does not preclude review of whether the allegations in the complaint, if taken as true, "were sufficient to state a claim and support a judgment of liability." *United States v. Conces*, 507 F.3d 1028, 1038-39 (6th Cir. 2007); *see also Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1079-80 (6th Cir. 1990). Furthermore, it is not clear that the default-judgment order superseded the summary-judgment order. Thus, we review the district court's denial of McGill's motion to dismiss and its partial grant of the plaintiffs' motion for summary judgment. In both cases, our review is de novo. *Autozone, Inc. v. Tandy Corp.*, 373 F.3d 786, 792 (6th Cir. 2004); *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002).

In challenging those orders, McGill makes four arguments: (1) the district court lacked subject-matter jurisdiction; (2) the district court should have dismissed the case or denied summary judgment under RFRA; (3) Seventh-day Adventism is a religion

and thus not eligible for trademark protection as a matter of law; and (4) there were genuine issues of material fact regarding whether the marks were generic and concerning the likelihood of confusion caused by McGill's use of the marks.

A. Subject-Matter Jurisdiction

McGill argues that the First Amendment precluded the district court from exercising jurisdiction because the district court could not apply neutral principles of trademark law without resolving an underlying doctrinal dispute: to wit, who are the "true" Seventh-day Adventists. He argues in the alternative that we should create a prudential exception of sorts to relinquish jurisdiction in cases like the one at bar.

As this case involves the enforceability of intellectual-property rights, it makes sense to consider the Supreme Court's precedents in the area of church property disputes. *See Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1246-48 (9th Cir. 1999). The Supreme Court has recognized that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1960). But the Court has also held that courts may apply "neutral principles of law" to resolve church property

disputes. *Jones v. Wolf*, 443 U.S. 595, 604 (1979); *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 367-68 (1970). Unlike in *Presbyterian Church*, in which property rights turned on whether a church had abandoned the tenets of the faith, this case does not require us to decide any issue of church doctrine. Both the plaintiffs and McGill believe that the second coming of Christ is imminent and that the Sabbath should be celebrated on Saturday. Their dispute concerns whether McGill can use the plaintiffs' marks to promote his church's services and materials. Plainly, the case can be resolved using the neutral principles of trademark law.

The Ninth Circuit case *Maktab* is instructive. That case concerned a Sufi order in which property rights, including the right to use certain trademarked names and symbols, were passed from one spiritual leader, known as the Teacher, to the next. The order had splintered, and the two resulting sects disputed which was the true successor to the last Teacher. The district court held that it had no jurisdiction to resolve a trademark-infringement claim brought by one sect against the other, as that would require it to decide the doctrinal issue of proper succession. The Ninth Circuit reversed, holding that "the district court can apply the regular factors that courts employ to determine infringement" and that "[t]he defendants can raise neutral defenses, such as prior use of the marks." *Maktab*, 179 F.3d at 1249. Like *Maktab*, the instant case can be resolved based on trademark

law, without addressing any doctrinal issues. Trademark law will not turn on whether the plaintiffs' members or McGill and his congregants are the true believers.[2]

Anticipating the neutral-principles approach, McGill asks us to create an exception to jurisdiction for situations in which "there is (1) religious use of (2) intellectual religious property and the application of neutral principles could, in effect, (3) decide a doctrinal dispute and (4) deprive one party the right to the free exercise of its religion." Appellant Br. at 13. In support of his proposed rule, McGill cites a set of cases involving the so-called ministerial exception to employment-discrimination statutes. The ministerial exception "precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution's constitutional right to be free from judicial interference in the selection of those employees." *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007). In essence, McGill asks the panel to create an analog to the ministerial exception under trademark law for litigants in his position.

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[2] It is relevant, however, whether "Seventh-day Adventist" describes a church or organization or, instead, a religion. If it describes a religion, then the term would not be subject to trademark protection. This is not a jurisdictional issue, but rather an issue about the validity of the trademarks. We address it below in Part C.

We decline the invitation. The ministerial exception is a highly circumscribed doctrine. It grew out of the special considerations raised by the employment claims of clergy, which "concern[] internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law." *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986). In fact, in blessing the ministerial exception, the *Hutchison* panel *distinguished* its facts from church property cases. The panel acknowledged that the neutral-principles approach governed in church property cases, but emphasized that that approach had never been applied to the realm of clergy employment and discipline. *Id.* It would be a perversion of the case law, and contrary to the *Jones* line of cases, now to carve out an exception to the neutral-principles approach in property cases.

To sum up, the district court properly exercised subject-matter jurisdiction over this case, and we do so now, as well.

B. RFRA

McGill claimed below that the enforcement of the plaintiffs' trademarks would violate his Free Exercise Clause rights because his religion mandates him to call his church "Creation Seventh Day Adventist." He argues, in essence, that his religious beliefs *require* him to violate the law and that the enforcement of the law against him is therefore unconstitutional.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (internal quotation marks omitted) (holding that state could deny unemployment benefits to drug users, including Native Americans who had ingested peyote for sacramental purposes). Under *Smith*, McGill would have no free-exercise defense to trademark law, which is neutral and generally applicable. In 1993, however, Congress enacted RFRA to restore the strict-scrutiny test of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), that *Smith* had overruled:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1. In *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997), the Supreme Court held that the enactment of RFRA, as applied to the states, exceeded Congress's remedial powers under § 5 of the Fourteenth Amendment. The Court has since vindicated the application of RFRA against the *federal* government. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006) (upholding the grant of a preliminary injunction to potential targets of federal drug prosecution under RFRA).

RFRA would appear to trigger strict scrutiny in this case. For a party to assert RFRA as a claim or a defense, "governmental action must (1) substantially burden, (2) a religious belief rather than a philosophy or way of life, (3) which belief is sincerely held." *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996). So far, no one has questioned the sincerity of McGill's belief that God requires him to continue his infringing use of the plaintiffs' marks. Being compelled to stop could substantially burden his religious practice. *See O Centro Espirita*, 546 U.S. at 426 (government conceded that application of Controlled Substances Act to plaintiffs, who received communion through a sacramental tea containing a Schedule I drug, would substantially burden a sincere exercise of

religion). McGill cannot claim the benefit of RFRA, however, because as we explain, the defense does not apply in suits between private parties.[3]

This case presents an issue of first impression in this circuit: whether RFRA applies only in suits against the government or also in suits by private parties seeking to enforce federal law against other private parties. The text of the statute makes quite clear that Congress intended RFRA to apply only to suits in which the government is a party. Then-Judge Sotomayor discussed the relevant provisions in a dissent in the Second Circuit:

> Two provisions of the statute implicitly limit its application to disputes in which the government is a party. Section 2000bb-1(c) states that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a *government*" (emphasis added). . . . When read in conjunction with the rest of the statute, . . . it becomes clear that this section reflects Congress's understanding that RFRA claims and defenses would be raised only against the government. For instance, section

[3] Because we hold that RFRA does not apply to suits between private parties, we do not reach the issues of whether McGill waived the defense by failing to raise it in his answer and whether the district court properly denied leave to amend his answer.

> 2000bb-1(b) of RFRA provides that where a law imposes a substantial burden on religion, the "*government*" must "demonstrate[ ] . . . that application of the burden" is the least restrictive means of furthering a compelling governmental interest (emphasis added). The statute defines "demonstrate" as "meet[ing] the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). Where, as here, the government is not a party, it cannot "go[ ] forward" with any evidence. In my view, this provision strongly suggests that Congress did not intend RFRA to apply in suits between private parties.
>
> I recognize that according to RFRA's "applicability" section, the statute applies "to all Federal law." 42 U.S.C. § 2000bb-3. This provision, however, is not inconsistent with a finding that the statute does not apply to suits between private parties. Read in conjunction with the rest of the statute, the provision simply requires courts to apply RFRA "to all Federal law" in any lawsuit to which the government is a party.

Hankins v. Lyght, 441 F.3d 96, 114-15 (2d Cir. 2006) (Sotomayor, J., dissenting) (footnotes omitted). We note further that Congress repeatedly referred to government action in the findings and purposes sections of RFRA. Congress found that "*governments* should not substantially burden religious exercise without compelling justification," that the pre-*Smith* regime had required that "the *government* justify

burdens on religious exercise," and that strict scrutiny was necessary for "striking sensible balances between religious liberty and competing prior *governmental* interests." 42 U.S.C. § 2000bb(a) (emphases added). Congress described RFRA's purpose as "to provide a claim or defense to persons whose religious exercise is substantially burdened *by government*." § 2000bb(b) (emphasis added).

RFRA's legislative history supports our view that Congress did not intend the statute to apply against private parties. "All of the examples cited in the Senate and House Reports on RFRA involve actual or hypothetical lawsuits in which the government is a party. *See* S. Rep. No. 103-111 (1993); H.R. Rep. 103-88 (1993)." *Hankins*, 441 F.3d at 115 n.9 (Sotomayor, J., dissenting).

The majority in *Hankins*, however, saw things differently. It found RFRA's language broad enough to apply "to an action by a private party seeking relief under a federal statute against another private party who claims that the federal statute substantially burdens his or her exercise of religion." *Id.* at 103. For three reasons, we do not follow the *Hankins* majority. First, as discussed above, RFRA's text does not support the *Hankins* majority's interpretation. Second, the *Hankins* majority limited its holding to the application of RFRA vis-a-vis federal laws that can be enforced by private parties *and* the government. That case concerned an action under the ADEA by a clergyman who had been forced into retirement. The ADEA claim could have been brought by the EEOC,

and the majority sought to avoid disparate application of the statute based on who brings discrimination charges. *Id.* There is no EEOC-like agency that can bring trademark-enforcement actions. Third, a different panel of the Second Circuit already has expressed "doubts about *Hankins*'s determination that RFRA applies to actions between private parties." *Rweyemamu v. Cote*, 520 F.3d 198, 203 (2d Cir. 2008). That panel stated that "we think the text of RFRA is plain," credited Judge Sotomayor's dissent, and concluded that RFRA should not apply to purely private disputes "regardless of whether the government is capable of enforcing the statute at issue." *Id.* at 203 n.2.

Meanwhile, the other two circuits to have reached the issue have held that RFRA does not apply to suits between private parties. *See Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (calling the *Hankins* decision "unsound" and explaining that "RFRA is applicable only to suits to which the government is a party"); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) ("It seems unlikely that the government action Congress envisioned in adopting RFRA included the protection of intellectual property rights against unauthorized appropriation."); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834, 837-43 (9th Cir. 1999) (noting that Congress did not specify that RFRA applies to nongovernmental actors, as it typically does when intending to regulate private parties, and holding that private parties could not be

considered state actors under RFRA unless they acted jointly with government officials to violate free-exercise rights). We now join their ranks.

C. Whether "Seventh-day Adventism" Can Be Trademarked

"The existence and extent of trademark protection for a particular term depends on that term's inherent distinctiveness. Courts have identified four general categories of terms: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful." *Bath & Body Works, Inc. v. Luzier Personalized Cosmetics, Inc.*, 76 F.3d 743, 748 (6th Cir. 1996) (internal quotation marks omitted). "If a mark's primary significance is to describe a type of product rather than the producer, it is generic. . . ." *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 404 (6th Cir. 2002). A generic mark cannot be protected as a trademark. *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 502 F.3d 504, 513 (6th Cir. 2007). McGill argues that "Seventh-day Adventism" refers to a religion, is therefore a generic term, and thus cannot be trademarked.[4]

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[4] As the district court explained, the plaintiffs' marks have become "incontestable" under the Lanham Act. *See* 15 U.S.C. § 1065 (explaining that a mark can attain this status if it is registered for five years and no adverse decision as to its ownership or validity has been rendered). In *Sovereign Order of Saint John of Jerusalem, Inc. v. Grady*, 119 F.3d 1236 (6th Cir. 1997), a panel of this court held that because the name of the

(Continued on following page)

McGill's argument is certainly logical: well-known terms that society understands to refer to a particular faith in general are generic, and no single party can prevent others from using them. *See, e.g., Christian Science Bd. of Dirs. of the First Church of Christ, Scientist v. Evans*, 520 A.2d 1347, 1352-53 (N.J. 1987) ("Christian Science" is a religion and therefore a generic name not entitled to trademark); *McDaniel v. Mirza Ahmad Sohrab*, 27 N.Y.S. 2d 525, 527 (N.Y. Sup. Ct. 1941) (holding that Baha'ism is a religion and that the use of word "Baha'i" could not be enjoined because "members of the same religion[ ] have an equal right to use the name of the religion"); *New Thought Church v. Chapin*, 159 A.D. 723, 724-25 (N.Y. App. Div. 1913) (denying injunction because plaintiffs claimed that "New Thought" referred to a religion and they could not "claim a monopoly of teaching this form of religious faith"); *cf. TE-TA-MA*

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plaintiffs' religious organization had become incontestable, it could not be challenged on the ground that it was the generic name of a religion. *Id.* at 1240-41 (holding that incontestable marks are "subject only to the eight defenses specified in § 1115(b)"). This holding is directly contradicted by the text of the incontestability provision, which states that "no incontestable right shall be acquired in a mark which is the generic name for the goods or services or a portion thereof, for which it is registered." § 1065(4). The later case *Nartron* correctly articulated the law in stating that a "mark's incontestable status . . . does not protect it from a challenge . . . premised on a claim that it has become generic." *Nartron*, 305 F.3d at 405; *see also Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 195 (1985) ("An incontestable mark that becomes generic may be canceled at any time pursuant to [15 U.S.C. § 1064].").

Truth Found.-Family of URI, Inc. v. World Church of the Creator, 297 F.3d 662, 666 (7th Cir. 2002) ("Church of the Creator" describes a Christian denomination, not a religion, and is not generic); *Nat'l Spiritual Assembly of the Baha'is Under the Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of the Baha'is, Inc.*, 150 U.S.P.Q. 346, 354 (N.D. Ill. 1966) (enjoining defendants' use of "Baha'i" because "the public has come to recognize the designation[] 'Baha'i' . . . as identifying the [plaintiff organization] and the Baha'i Faith as administered by [it]").

This circuit has held that "[w]hether a name is generic is a question of fact." *Bath & Body Works*, 76 F.3d at 748. "The appropriate test for genericness is whether the public perceives the term primarily as the designation of the article." *Id.* (internal quotation marks omitted). It would be inappropriate to conclude as a matter of law, regardless of the evidence that could be adduced (and that was presented at summary judgment in this case), that the public considers "Seventh-day Adventist" to refer generically to a religion.[5] *See Gen. Conference Corp. of Seventh-day Adventists v. Seventh-day Adventist Congregational Church*, 887 F.2d 228, 230-31 (9th Cir. 1989) (judgment on the pleadings was improper because defendants argued that Seventh-day Adventism was a

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[5] In their reply to McGill's response to their summary-judgment motion below, the plaintiffs stated that their organization's "members are followers of the Christian faith." SJ Reply at 2 (Doc. 59).

religion and thus generic); *Gen. Conference Corp. of Seventh-day Adventists v. Perez*, 97 F. Supp. 2d 1154, 1162 (S.D. Fla. 2000) (court, sitting as factfinder after a bench trial, found that "Seventh-day Adventist" referred to the plaintiffs' church, not a religion, in the eyes of the public); *Stocker v. Gen. Conference Corp. of Seventh-day Adventists*, 39 U.S.P.Q. 2d 1385, 1996 WL 427638, at *11-17 (Trademark Tr. & App. Bd. 1996) (reviewing testimony, reference materials, and survey evidence and concluding that petitioners had not met burden of establishing genericness for cancellation of trademark). *But see Gen. Conference Corp. of Seventh-day Adventists v. Seventh-day Adventist Kinship, Int'l, Inc.*, No. CV 87-8113, 1991 WL 11000345, at *6-7 (C.D. Cal. Oct. 7, 1991) (holding, apparently as a matter of law, that "Seventh-day Adventist" has a dual meaning, referring to the church and to adherents of the religion, and that a support group for gay and lesbian followers could use the term; but also noting that the result might be different if the defendants had used "Seventh-day Adventist" as part of a church's name).

McGill makes one last effort to secure a legal ruling of genericness. He argues that the plaintiffs here should be collaterally estopped from denying that "Seventh-day Adventist" refers to a religion because that issue was decided in *Benn v. Seventh-day Adventist Church*, 304 F. Supp. 2d 716 (D. Md. 2004). In *Benn*, a student in Trinidad injured himself on a weekend retreat sponsored by an organization affiliated with the General Conference's church, and

he sued the "Seventh-Day Adventist Church" in tort. The district court found that "there is no legal entity known as the 'Seventh-Day Adventist Church'" and further remarked that "the Seventh-Day Adventist Church is a religion, not a cognizable legal entity." *Id.* at 721. Inferring that the student intended to sue the General Conference (one of the plaintiffs in the instant case), the court noted that it could substitute that entity as the defendant. But because the General Conference is an unincorporated corporation, the district court had to consider the citizenship of its constituent unions and missions for diversity purposes. Some of those constituent parts were aliens, like the student himself, destroying diversity. *Id.* at 721-22. The case therefore turned on the fact that the student had sued a nonentity and that the substitution of the entity he had intended to sue removed subject-matter jurisdiction. Thus, collateral estoppel does not apply because the issue of whether Seventh-day Adventism is a religion, even if it were actually decided, was not necessary to the outcome in *Benn*. *See Schreiber v. Philips Display Components Co.*, 580 F.3d 355, 367 (6th Cir. 2009).

McGill has a stronger claim for judicial estoppel based on arguments made by the General Conference Corporation in a memorandum in *Benn*, which McGill included in the record in the district court. The plaintiff-student in *Benn* added the General Conference Corporation as a defendant in his amended complaint. In opposing the student's motion to file a second amended complaint, the General Conference

Corporation contended that dismissal was required and argued the following: "By naming the 'Seventh-day Adventist Church' as a defendant, Plaintiff attempts to sue a religion rather than a religious institution. . . . [T]he Seventh-day Adventist Church is a religion that may be treated as an 'unincorporated association' only by resorting to an unconstitutional fiction." *Benn*, No. 03-330, Opp'n to Pl.'s Mot. for Leave to File Second Am. Compl. (filed as attachment to McGill's Brief in Support of Motion to Dismiss, Doc. 30-11). We have previously discussed the contours of judicial estoppel:

> The doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. A court should also consider whether the party has gained an unfair advantage from the court's adoption of its earlier inconsistent statement. Although there is no set formula for assessing when judicial estoppel should apply, it is well-established that at a minimum, a party's later position must be clearly inconsistent with its earlier position for judicial estoppel to apply. Moreover, the doctrine of judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement.

Lorillard Tobacco Co. v. Chester, Willcox & Saxbe, LLP, 546 F.3d 752, 757 (6th Cir. 2008) (citations and internal quotation marks omitted). It is clear that the General Conference Corporation gained no unfair advantage in *Benn* from that court's crediting its argument that "Seventh-day Adventist Church" refers to a religion. The dispositive points in that case were that "Seventh-day Adventist Church" was not a jural entity and that the intended defendant, the unincorporated General Conference, was not diverse from the plaintiff. Accordingly, judicial estoppel does not apply.

D. Summary Judgment

Finally, McGill challenges the district court's grant of summary judgment to the plaintiffs on trademark infringement of the mark "Seventh-day Adventist." The plaintiffs claim that the default-judgment order moots this issue because that order resolved the entire case – that is, it provided an independent basis for granting relief as to the "Seventh-day Adventist" mark. McGill replies that the default-judgment order pertained only to those claims that were not resolved at summary judgment.

Both parties find support for their positions in the district court's own language. As McGill points out, the district court concluded the default-judgment order by stating that "default judgment will be awarded to the Plaintiffs on their *remaining claims*." *McGill*, 2009 WL 1505738, at *7 (emphasis added). On the other hand, other language in the order

suggests that the order encompassed all claims. After declining the plaintiffs' request to extend the grant of partial summary judgment to cover the other marks based on the safe-distance rule,[6] the district court noted that "default judgment as a sanction provides an alternative and independent ground upon which this Court may grant the Plaintiffs' request for a permanent injunction." *Id.* at *6. The same order provided the language of the preliminary injunction, which included a prohibition on McGill's use of "Seventh-day Adventist." *Id.* at *6 n.9. Furthermore, in denying McGill's motion to stay the injunction pending appeal, the court remarked that "this case was not decided on the merits of the claims." Order Denying Mot. to Stay at 3 (Doc. 103). It explained that the case had been resolved on default judgment based on "the Defendant's willful refusal to comply with this Court's pretrial orders." *Id.* That order, however, came down after McGill had filed his notice of appeal, and we cannot say with confidence either that it merely clarified or that it sought to modify the default-judgment order. Under these circumstances, and given that McGill fully and properly litigated the summary-judgment stage, we take the summary-judgment order as properly before us.

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[6] Under this rule, advanced in *Broderick & Bascom Rope Co. v. Manoff*, 41 F.2d 353 (6th Cir. 1930), a party can "be required to keep a safe distance away" from using terms that resemble the validly trademarked terms, even though the former are not themselves protected. *Id.* at 354.

Summary judgment is appropriate when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). This court's focus must be on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). In conducting that inquiry, we draw all reasonable inferences in favor of the nonmoving party. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004).

To prevail on their claim that McGill infringed their "Seventh-day Adventist" mark, the plaintiffs had to prove that their trademark was valid and that McGill's use of the mark was likely to cause confusion among the relevant consumers of the parties' services and materials. *See Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 280 (6th Cir. 1997).

On validity, we agree with the district court first, that the mark is presumptively nongeneric and that McGill bore the burden of proving otherwise (because the marks had become "incontestable," which McGill did not challenge), and second, that he could not carry that burden. As noted above, the test for whether a term is generic and therefore ineligible for trademark protection is "whether the public perceives the term primarily as the designation of the article." *Bath & Body Works*, 76 F.3d at 748 (internal quotation marks omitted). McGill's argument for

genericness is that "Seventh-day Adventist" describes a religion, but he offers scant evidence that *the public* perceives the term as referring to a particular set of beliefs rather than to the plaintiffs' church. McGill works to show that the plaintiffs' evidence – previous judicial rulings, survey evidence, expert testimony – does not establish nongenericness by a preponderance of the evidence, but this approach gets the burden of persuasion backwards. His own evidence consists of (1) his personal testimony and that of a theology graduate student, (2) a dictionary definition, (3) a Wikipedia entry, (4) the fact that the plaintiffs use "Seventh-day Adventist" as a noun rather than an adjective, and (5) the fact that two breakaway churches use the term in their names. McGill's testimony does not provide an objective appraisal of the public's view, and the graduate student's opinion does not appear to be based on any study of popular perceptions. The dictionary and Wikipedia entries, meanwhile, concern the term "Adventist," not "Seventh-day Adventist." And the noun/adjective distinction goes not to genericness but to descriptiveness, which is no shield against a mark that has become incontestable. *Park 'N Fly, Inc.*, 469 U.S. at 196. Finally, the existence of the breakaway churches does little to help McGill. As the district court wrote, "[i]f anything, the fact that the Defendant can point to only two other splinter groups founded in the last century that bear the name supports the conclusion that members of the relevant public would generally associate the term with the churches affiliated with the General Conference." *McGill*, 624 F. Supp. 2d at 894.

Even taking the relevant public as "Christians and, more specifically, Adventist Christians (that is, those who believe in the nearness of the second coming of Christ)," *Stocker*, 1996 WL 427638, at *11, 17, McGill has adduced insufficient evidence to show that this group would understand "Seventh-day Adventist" as referring to certain religious beliefs rather than to the plaintiffs' church.

We likewise agree with the district court that no reasonable jury could find other than that McGill's use of the mark is likely to cause confusion among the public. The plaintiffs retain the burden of persuasion on this element. *Interactive Prods. Corp. v. A2Z Mobile Office Solutions, Inc.*, 326 F.3d 687, 694 (6th Cir. 2003). The following factors should be considered in determining likelihood of confusion: "1) the strength of the senior mark; 2) relatedness of the goods and services; 3) the similarity of the marks; 4) evidence of actual confusion; 5) the marketing channels used; 6) likely degree of purchaser care; 7) the intent of the defendant in selecting the mark; and 8) the likelihood of expansion of the product lines." *Id.* The district court considered these factors and found that "[a]lmost every single factor weighs in the Plaintiffs' favor; those that do not are less worthy of consideration when they favor an alleged infringer." *McGill*, 624 F. Supp. 2d at 900.

We will not review each factor here; suffice it to say that we concur with the district court's thoughtful and thorough review of the evidence. Instead, we address McGill's main challenge to the district court's

analysis, that it misjudged the factors in light of the identity of the relevant public. McGill argues that the relevant public – those who believe in the imminence of Christ's return and that the Sabbath should be observed on Saturday – are so discerning that there is a genuine issue of material fact about the likelihood that they would confuse McGill's church for the plaintiffs' church. But while it may indeed be hard to envision a person mistakenly joining the wrong church, it is not at all difficult to imagine a person consuming McGill's published materials and ascribing his teachings to the General Conference, especially in light of the relatedness of the parties' services and similarity of the marks. Accordingly, we agree that the plaintiffs were entitled to summary judgment on the likelihood of confusion, and we uphold the district court's judgment as to the mark "Seventh-day Adventist."[7]

III. CONCLUSION

For the reasons discussed above, we **AFFIRM** the district court's denial of McGill's motion to dismiss, its grant of partial summary judgment to the plaintiffs, and its default judgment against McGill.

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[7] McGill raised a number of defenses in his answer, but he did not argue them at summary judgment and he does not do so on appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS and GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, an Unincorporated Association,

Plaintiffs,

No. 06-1207

v.

WALTER MCGILL, d/b/a CREATION SEVENTH DAY ADVENTIST CHURCH, et al.,

Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION

(Filed Jan. 6, 2010)

Before the Court is the Report and Recommendation on Contempt and Sanctions issued by United States Magistrate Judge Edward G. Bryant on December 14, 2009, pursuant to an order of reference, in which Judge Bryant recommended, *inter alia*, that Defendant, Walter McGill, be held in civil contempt. (Docket Entry ("D.E.") No. 111.) The report sets forth a thorough and accurate assessment of the applicable law, which need not be repeated here, and recounts

numerous efforts on the part of both the Court and the Plaintiffs to inveigle the Defendant's cooperation with procedural rules and court orders – all to no avail, despite repeated warnings that Defendant's continued recalcitrance could result in a finding of contempt for his violation of this Court's May 28, 2009 Injunction Order (the "Injunction Order"). (D.E. No. 98.)

The magistrate judge's recommendation that Defendant be held in contempt was based on the Defendant's failure to comply with the Injunction Order – specifically, through the continued use of proscribed domain names and websites, as well as signs and promotional materials that violate the injunction. This Court scheduled a hearing for November 5, 2009 on Plaintiffs' Renewed Motion and Memorandum for an Order to Show Cause (D.E. No. 105), but the Defendant neither responded to the motion nor appeared at the hearing. Further, the Plaintiff has failed to file an objection to the report and recommendation, and the time for doing so has elapsed.

Therefore, the magistrate judge's report and recommendation is hereby ADOPTED in full. The Court holds the Defendant in contempt for his willful failure to abide by this Court's orders. Pursuant to the magistrate judge's recommendation, the Court finds that limited discovery is appropriate for the purpose of permitting Plaintiffs to ascertain the identities of those who may have acted in concert with Defendant in this matter. Defendant is hereby

ORDERED to cooperate fully with Plaintiffs in such limited discovery. The Court further finds that the following domain names and the websites located at such domain names violate the Injunction Order, and that all persons acting in concert with Defendant – including any website hosting companies and domain name registrars – are hereby ENJOINED from using or enabling the use of such domain names and websites:

www.creationseventhdayadventistchurch.ca
www.csdadventistchurch.co.cc
www.csdachurch.co.cc/
www.csdachurch.0adz.com
www.creationsdadventistrelief.to
www.csda-adventistchurch.to
www.creationsdadventistrelief.to
www.adventistry.org
www.creationseventhdayadventist.org.rw
www.creationsdarelief.0adz.com
www.seventhdayadventistsda-v-creation7thday adventistcsda-uslawsuit.net
www.seventhdayadventism.org
www.7thdayadventism.org/
www.whypastorwaltermcgillisnotaffiliatedwithgcsda adventistchurch.net
www.csdachurch.wordpress.com
www.csda-korea.org
www.creationseventhdayadventistreliefprojectsint.ltd.ug
www.seventhdayadventistchurchfoundwanting.us
www.home.comcast.net/~7thdayadventist
www.home.comcast.net/~csdachurch
www.home.comcast.net/~creationsda
www.home.comcast.net/~creation-adventist
www.binaryangel.net

www.thefourthangel.net
www.home.comcast.net/~creation-sabbath
www.home.comcast.net/~barbara_lim
www.home.comcast.net/~crmin

The Court further holds that Plaintiffs or their agents should be and are permitted to remove and permanently dispose of Defendant's signs and promotional materials that violate the Injunction Order, with the costs of such removal and disposal to be taxed to Defendant. Defendant's counsel should accompany Plaintiffs or their agent(s) during the removal of any infringing materials, and prior to the removal of any such signs or materials, Plaintiffs' counsel shall notify Defendant and any building managers, property owners, or landlords who may be affected. Finally, the Court ORDERS the Defendant to pay attorneys' fees and costs to the Plaintiffs in the amount of $35,567.00.

IT IS SO ORDERED this, the 6th day of January, 2010.

s/ J. DANIEL BREEN
UNITED STATES
DISTRICT JUDGE

APPENDIX C

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that –

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are –

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398

(1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

---

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

---

§ 2000bb-2. Definitions

As used in this chapter –

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

---

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

---

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

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No. 10-_____

Supreme Court, U.S.
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In The

Supreme Court of the United States

WALTER MCGILL, PETITIONER,

v.

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS AND THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AN UNINCORPORATED ASSOCIATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
EASTERN DIVISION**

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS and GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, an Unincorporated Association,	)	
Plaintiffs,	)	Case No. 1:06-cv-01207
v.	)	
WALTER McGILL, d/b/a CREATION SEVENTH DAY ADVENTIST CHURCH, *et al.*,	)	
Defendants.	)	

REPORT AND RECOMMENDATION ON CONTEMPT AND SANCTIONS

(Filed Dec. 14, 2009)

Before the Court is the Renewed Motion and Memorandum for Order to Show Cause (D.E. No. 105) filed by Plaintiffs, General Conference Corporation of Seventh-day Adventists and General Conference of Seventh-day Adventists. This matter was referred to the Magistrate Judge for determination and/or Report and Recommendation (D.E. No. 106). Upon consideration of Plaintiffs' Motion and

Memoranda, and arguments of counsel at the hearing held by this Court on November 5, 2009, and the entire record in this matter, the Magistrate Judge recommends that Plaintiffs' Motion be granted.

PROCEDURAL BACKGROUND

As a result of the Defendant's repeated refusal to participate in a Court ordered mediation conference, and in accordance with Rules 16(f) and 37(b)(2)(A)(ii)-(vii), Fed.R.Civ.P, Plaintiffs filed a Motion for Sanctions and Permanent Injunctive Relief ("Motion for Sanctions"), requesting that this Court sanction Defendant for his actions, including the sanctions of the entry of default judgment as well as permanent injunctive relief against Defendant. (D.E. No. 85).

On April 16, 2009, a Report and Recommendation ("R&R") was entered recommending that Plaintiffs' Motion for Sanctions be granted, and that a permanent injunction be issued. (D.E. No. 94). Defendant filed an objection to the R&R, and the Plaintiffs filed a limited exception. After considering the parties' positions, on May 28, 2009, the Court entered its Injunction Order, therein adopting the R&R in full, including its recommendation that a permanent injunction be issued against the Defendant. (D.E. No. 98) (the "Injunction Order").

Defendant was duly notified of and served with a copy of the Injunction Order, evidenced by the fact that he filed a Notice of Appeal to the Sixth Circuit Court of Appeals (D.E. 99), as well as a Motion to

Stay Injunction pending Defendant's appeal. (D.E. No. 100).

On June 30, 2009, Plaintiffs filed a Motion for Order to Show Cause (D.E. No. 102) due to Defendant's failure to comply with the Injunction entered by the Court on May 28, 2009 (D.E. No. 98). Due to the pendency of Defendant's Motion to Stay Injunction Pending Appeal, the Court denied without prejudice the Plaintiffs' Show Cause Motion. The Court noted, however, the seriousness of the assertions, that the Injunction Order must be complied with henceforth, and the consequences of continued noncompliance. (Order dated Aug. 5, 2009, D.E. No. 103).

In response to the Court's Order of August 5, 2009, Plaintiffs' counsel requested that the Defendant comply with the prohibitions and requirements placed upon him through the Court's Orders and the Injunction. (*See* D.E. No. 105, Exhibit 1, 8/7/09 email from Galanter to Holliday). In that regard, among the other requirements of the Injunction, it was requested that the Defendant promptly cease using numerous violative domain names and websites, that Defendant remove all violative signage and other promotional materials, and that the sworn compliance statement be filed within 20 days of the Court's August 5, 2009 Order. (*Id.*) Later that day, Defendant himself responded to that email. (*Id.*, email from Defendant to Holliday) By that email, Defendant suggested that he would continue to violate the Injunction Order and August 5, 2009 Order and further suggested a belief that some of his activities

and websites were beyond the Court's jurisdictional reach. (*Id.*)

In response, Plaintiffs subsequently filed their Renewed Motion and Memorandum for Order to Show Cause. (D.E. No. 105). By Docket Entry dated October 20, 2009 this Motion was set for hearing on November 5, 2009. Although Defendant had the opportunity to show cause as to why he should not be held in contempt of court for his failure to abide by the Court's Injunction by either a written response to the original or renewed motion, or by appearing at the hearing held on November 5, 2009, Defendant did not file any written response or appear at the hearing. Instead, Defendant's counsel appeared alone at this hearing, without his client, and offered a general objection to a finding of contempt.

ANALYSIS

A. Standard for Civil Contempt

A decision on a motion for contempt lies within the sound discretion of the court. *See Electrical Workers Pension Trust Fund of Local Union #58 v. Gary's Elec. Serv.*, 340 F.3d 373, 378 (6th Cir. 2003). The contempt power "is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed" by law. *Id.* (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911). Contempt proceedings are used to enforce the message that court orders are

not to be taken lightly, but rather are to be complied with in a prompt manner. *Id.*

In civil contempt proceedings, judicial sanctions may be imposed for either or both of two purposes: (1) to coerce the defendant into compliance with the court's order; and (2) to compensate the movant for the losses sustained. *Id.* at 379 (*citing United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947)).

To establish a *prima facie* case of contempt, the movant must produce clear and convincing evidence to show a violation of a definite and specific order of which that party had knowledge, and which directed that party to perform or refrain from performing a particular act or acts. *Id.*, (*citing NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987)). Once the movant establishes his *prima facie* case, the burden shifts to the contemnor to show why he is unable to comply with the court's order. *Id.* To meet this burden in the Sixth Circuit, the party charged with contempt must show "categorically and in detail" why they are unable to comply with the court's order. *Id.* (quoting *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996). The court must then consider whether the party charged with contempt took all reasonable steps within their power to comply with the court's order. *Id.*, at 383.

B. Defendant Is In Contempt for His Failure to Comply with the Injunction Order

The Permanent Injunction entered by this Court on May 28, 2009, orders as follows:

> Defendant and his agents, servants and employees, and all those persons in active concert or participation with them, should be forever enjoined from using the mark SEVENTH-DAY ADVENTIST, including the use of the words SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as part of, or in combination with any other words, phrases, acronyms or designs, or any mark similar thereto or likely to cause confusion therewith, in the sale, offering for sale, distribution, promotion, provision or advertising of any products and services, and including on the Internet, in any domain name, key words, metatags, links, and any other use for the purpose of directing Internet traffic, at any locality in the United States. Subject to the foregoing, Defendant may use these terms in a non-trademark sense, such as oral or written use of the marks to refer to the Plaintiffs, or oral or written use of certain terms in a non-trademark descriptive sense, such as "this Church honors the Sabbath on the 'seventh day,'" or "the members of this church believe in the 'advent' of Christ."
>
> As it pertains to all labels, signs, packages, wrappers, receptacles, and advertisements bearing the SEVENTH-DAY ADVENTIST

> mark, or bearing the words SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as part of or in combination with any other words, phrases, acronyms or designs, or any mark similar thereto or likely to cause confusion therewith, and all plates, molds, matrices, and other means of making the same (collectively, "Defendant's Infringing Articles"), Defendant shall either:" (1) deliver Defendant's Infringing Articles to Plaintiffs' attorney within twenty (20) days after issuance of the Order, to be impounded or permanently disposed of by Plaintiffs; or (2) permanently dispose of Defendant's Infringing Articles himself within twenty (20) days of this Order, certifying in writing and under oath that he has personally complied with this Order.
>
> Regardless of the manner of disposal of Defendant's Infringing Articles, Defendant shall file with the Clerk of this Court and serve on Plaintiffs, within twenty (20) days after issuance of this Order, a report in writing, under oath, setting forth in detail the manner and form in which Defendant has complied with the forgoing injunction.

(D.E. No. 98, pp. 12-13).

It is undisputed that Defendant has knowledge of the existence and terms of the Injunction Order. It is also undisputed that Defendant has wholly failed to comply with the terms of the Injunction Order in that he has: (1) continued to use the mark SEVENTH-DAY ADVENTIST, including the use of the words

SEVENTH-DAY and ADVENTIST, and the acronym SDA, either together, apart, or as part of, or in combination with other words, phrases, acronyms or designs, in the sale, offering for sale, distribution, promotion, provision or advertising of products and services, including on the Internet in domain names; (2) failed to either (i) deliver Defendant's Infringing Articles to Plaintiffs' attorney, or (ii) permanently dispose of Defendant's Infringing Articles himself, and certify in writing and under oath that he has personally complied with this order; and (3) failed to file with the Clerk of this Court and serve on Plaintiffs, a report in writing, under oath, setting forth in detail the manner and form in which Defendant has complied with the terms of the Permanent Injunction.

Defendant, however, has not stopped there. Since the entry of the injunction, Defendant has publicized his failure to comply on at least one of his websites, and has taken affirmative actions to violate the Injunction Order.

In this regard, Defendant has posted an "Update" on his website that states that:

> **Update 05/27/09:** An injunction is issued by judge Daniel Breen enjoining the Church from using the names Seventh-day Adventist, Seventh-day, Adventist, or the acronym SDA with an order to submit a sworn notice of compliance to the Court by June 17, 2009. No compliance report was filed.

(*See*, D.E. 102, Exhibit 1, p. 9)

Additionally, it is uncontested that after it became apparent that Defendant was not going to comply with the Injunction Order, Plaintiffs, through counsel, began discussions with the website hosts and domain name registrars for Defendant's numerous websites. In response to these efforts, several of Defendant's websites were taken off of the Internet and the domain names were "locked" by the website hosts and domain name registrars. However, in response to this, Defendant actively began "redirecting" his prohibited domain names to other websites and domain names that had yet to be taken down and/or disabled by these third parties. (*See, Id.* Exhibit 2) By doing this, Defendant was actively violating the injunction.

The Magistrate Judge believes that Plaintiffs have met their burden of proof, and that Defendant has taken no steps to comply with the Court's Order, and therefore recommends a finding that Defendant is in Contempt of Court.

C. Sanctions and Other Relief

1. Award of Attorneys' Fees and Costs

Upon a finding of contempt, a court has broad discretion in assessing sanctions to protect the sanctity of its decrees and the legal process, including allowing a movant to recover attorneys' fees and expenses incurred in prosecuting a contempt motion. *See TWM Mfg. Co. v. Dura Corp.*, 722 F.2d 1261, 1273 (6th Cir. Mich. 1983); *Board of Supervisors of The Louisiana*

State University v. Smack Apparel Co., 574 F.Supp.2d 601 (E.D.La. 2008); *see also, Premium Nutritional Products, Inc. v. DuCote*, 571 F.Supp.2d 1216, 1220 (D.Kan. 2008). In fact, one of the primary purposes of civil contempt is to "compensate for injuries caused by noncompliance." *TWM Mfg. Co. v. Dura Corp.*, 722 F.2d at 1273. Here, Plaintiffs have incurred attorneys' fees and costs in the amount of $35,567.00 seeking compliance with the Injunction Order and this Order of Contempt. (*See*, D.E. No. 110, Notice of Filing Galanter Dec'l in Support of Fee Request) To compensate for those losses sustained, the Magistrate Jude [sic] recommends that Defendant be ordered to pay these fees and costs to Plaintiffs.

2. Remedies Related to Ongoing Internet Violations

Defendant continues to violate the injunction on the Internet through the use of domain names that violate the Injunction and/or websites that contain content that violates the Injunction. (*See* D.E. No. 105, Exhibit 1, 8/7/09 email from Galanter to Holliday) Further, Defendant has indicated that he intends to continue to violate the Injunction in this way. (*See Id.*, email from Defendant to Holliday)

Defendant has asserted that some of these domain names and websites may be registered, hosted, and or operated outside of the United States and are thus beyond its jurisdiction. While the Court's Jurisdiction beyond the territorial borders of the United

States is certainly limited, its jurisdiction over the Defendant is not similarly restricted. "It is a familiar rule of Anglo-American law that once a court has obtained personal jurisdiction over a defendant, the court has power to command the defendant to do or not to do acts outside the territorial jurisdiction of the court." McCarthy on Trademarks §30:15 (*citing*, in pertinent part, *New Jersey v. New York*, 283 U.S. 473, 75 L. Ed. 1176, 51 S. Ct. 519 (1931).

Additionally, at the hearing held on Plaintiffs' Motion, Defendant's counsel suggested that certain of the violative domain names and websites may be registered and/or operated by individuals other than the Defendant. In this event, it is likely that such individuals are also violating the terms of the Injunction Order as it expressly applies to "Defendant and his agents, servants and employees, and all those persons in active concert or participation with them." (*See* D.E. No. 98 and Fed.R.Civ.P. 65(d)(2)).

Accordingly, the Plaintiffs requested at the hearing that they be allowed to conduct limited discovery in order to determine the extent of Defendant's violation of the Injunction, including third party discovery to ascertain the identities of and/or the extent to which Defendant's agents, servants, employees, and those persons in active concert or participation with them have assisted Defendant in violating the Permanent Injunction.

The scope of discovery is within the sound discretion of the trial court. *Chrysler Corp. v. Fedders*

Corp., 643 F.2d 1229, 1240 (6th Cir. 1981). Further, the Court's authority to enforce its orders through the contempt process includes the authority to allow discovery of Defendant and those persons in active concert or participation with Defendant as it relates to continued violations of the Injunction Order. *See Palmer v. Rice*, 231 F.R.D. 21 (D.D.C. 2005) (granting plaintiff's request to take discovery in aid of enforcement of 10-year old permanent injunction); *see also*, *E. & J. Gallo Winery v. Andina Licores S.A.*, 2007 WL 333386 (E.D. Cal. 2007) (holding that court retained jurisdiction to implement and enforce permanent injunction, including by way of post-judgment discovery related thereto, and allowing plaintiff to conduct post-judgment discovery directed to compliance with and enforcement of permanent injunction).

The Magistrate Judge is of the opinion that ascertaining the identities of those persons acting on behalf of or in concert with the Defendant, as well as the extent to which those persons have assisted Defendant, will help with enforcement of the Court's Injunction Order. Accordingly, the Magistrate Judge recommends a finding that limited discovery is appropriate and that Plaintiffs be permitted to take reasonable discovery of Defendant and/or third parties concerning the identity of those acting in concert with Defendant and the extent and methods by which Defendant and those acting in concert with him are continuing to violate the terms of the Injunction Order.

Finally, it is uncontested that since the entry of the Injunction Order the creation and use of domain names and websites that are violative of the Injunction has proliferated. It is also not contested that such actions have been carried out by Defendant and/or individuals acting in concert with him. These domain names and the websites found at such domain names have been as identified as follows:

www.creationseventhdayadventistchurch.ca
www.csdadventistchurch.co.cc
www.csdachurch.co.cc/
www.csdachurch.0adz.com
www.creationsdadventistrelief.to
www.csda-adventistchurch.to
www.creationsdadventistrelief.to
www.adventistry.org
www.creationseventhdayadventist.org.rw
www.creationsdarelief.0adz.com
www.seventhdayadventistsda-v-creation7thday adventistcsda-uslawsuit.net
www.seventhdayadventism.org
www.7thdayadventism.org/
www.whypastorwaltermcgillisnotaffiliatedwithgcsdaa dventistchurch.net
www.csdachurch.wordpress.com
www.csda-korea.org
www.creationseventhdayadventistreliefprojectsint. ltd.ug
www.seventhdayadventistchurchfoundwanting.us
www.home.comcast.net/~7thdavadventist
www.home.comcast.net/~csdachurch
www.home.comcast.net/~creationsda
www.home.comcast.net/~creation-adventist
www.binaryangel.net

www.thefourthangel.net
www.home.comcast.net/~creation-sabbath
www.home.comcast.net/~barbara_lim
www.home.comcast.net/~crmin

(*See* D.E. No. 105, Exhibit 1, 8/7/09 email from Galanter to Holliday)

Accordingly, in addition to the more general prohibitions contained in the Injunction Order, the Magistrate Judge recommends that the Court make a specific finding that these domain names and the websites found at the domain names are also violative of the Injunction Order and that all persons acting in concert with Defendant, including any website hosting companies and domain name registrars, are hereby enjoined from using or enabling the use of such domain names and websites.

3. Remedies Related to Defendant's Signage and other Promotional Material

It is also uncontested that Defendant has failed to either (i) deliver Defendant's Infringing Articles to Plaintiffs' attorney, or (ii) permanently dispose of Defendant's Infringing Articles himself, and certify in writing and under oath that he has personally complied with this order. Defendant has also failed to file a report in writing, under oath, setting forth in detail the manner and form in which Defendant has complied with the terms of the Permanent Injunction. Accordingly, due to Defendant's failure to act and to

take down and/or dispose of signage and other promotional materials that are violative of the injunction, Plaintiffs have requested that the United States Marshalls be ordered to remove the Infringing Articles. The Magistrate Judge is not convinced that involvement by the Marshalls is necessary here. A more appropriate solution is that such materials be removed by Plaintiffs or by Plaintiffs' designated agent, with Defendant paying cost of removal. Before the removal of these materials Defendant's counsel should notify Defendant and any building managers, property owners or landlords affected. Further, Defendant's counsel should accompany Plaintiffs or their agent when the Infringing Articles are removed.[1]

Respectfully submitted on this 14th day of December, 2009.

/s/ Edward G. Bryant
EDWARD G. BRYANT
U.S. MAGISTRATE JUDGE

---

[1] This recommendation applies to signage and other promotional materials that contain words, phrases and or acronyms prohibited by the Injunction Order, and which are located at 1162 Old Highway 45 South, Guys, Tennessee, which is the location of Defendant's "Creation Seventh Day Adventist Church," and 1321 Hwy 72 East, Suite #6, which is the location of Defendant's "Help 4-U" office. At the November 5, 2009 Hearing, Plaintiffs' counsel presented to the Court photographs taken on November 4, 2009, depicting, in part, the violative signage at these locations.

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.

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(4)

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In the Supreme Court of the United States

WALTER MCGILL, PETITIONER

v.

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS AND THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, we certify that respondent General Conference Corporation of Seventh-day Adventists is a District of Columbia non-profit corporation. Respondent General Conference of Seventh-day Adventists is a Maryland unincorporated association. As such, neither respondent has a parent or publicly held company owning 10% or more of its stock.

QUESTION PRESENTED FOR REVIEW

Whether the Petitioner preserved a defense under the Religious Freedom Restoration Act ("RFRA") and, if so, whether the Sixth Circuit erred in holding that RFRA is not a defense available to him where, unlike the cases Petitioner cites, he was sued under a statute that is not subject to government enforcement?

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INTRODUCTION

Petitioner McGill incorrectly asserts that this case presents a circuit split as to whether the Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488, applies to actions brought by private parties. In fact, as the court below recognized, McGill's argument improperly conflates two very different lines of cases: Some involve statutes, like the federal laws prohibiting employment discrimination, that provide for enforcement by *both* private parties and by government agencies. Other statutes, like the trademark laws involved in this case, provide *only* for private enforcement. Although there is a very shallow—and likely transitory—conflict as to the first type of statute, there is no conflict at all as to the second. Indeed, to our knowledge the decision below was the first circuit court decision to determine whether RFRA applies in the context of a federal statute that is *not* subject to governmental enforcement.

But even if this case involved a genuine conflict, serious vehicle problems counsel against review here. For one thing, McGill did not timely present his RFRA argument before the trial court, which ruled that the argument had been waived, and the Sixth Circuit did not disturb that ruling. Moreover, the trial court ultimately entered a default judgment against McGill based not on the merits, but on his independent, willful violations of the court's orders. As the Sixth Circuit held, McGill waived any argument to reverse the default judgment on appeal. Thus, even if this Court were to reach the RFRA issue and rule in McGill's favor on that point, such a ruling could not have any effect on the ultimate disposition of this case. And even if it could, it would be

far better to choose another case that does not arise in the highly unusual circumstance of a dispute between two religious organizations.

STATEMENT

The Parties. Respondent General Conference of Seventh-day Adventists ("General Conference") is an unincorporated association that represents the interests of the Seventh-day Adventist Church, an unincorporated association. Pet. 3a. The General Conference was formed in 1863 and grew out of several congregations with the shared belief that Jesus Christ's Second Advent was imminent and that the Sabbath should be observed on the seventh day of the week. *Ibid.* Since the official formation of the Church, the names "Seventh-day Adventist" and "SDA" have been used by the Seventh-day Adventist Church as the Church's name, and as its trade name in advertising and publishing. *Ibid.*

Respondent General Conference Corporation of Seventh-day Adventists ("Corporation") is a District of Columbia corporation that holds title to the trademarks "Seventh-day Adventist," "Adventist," and "General Conference of Seventh-day Adventists," registered with the United States Patent and Trademark Office. *Id.* at 3a-4a.

Petitioner McGill was originally baptized in a Seventh-day Adventist church. *Id.* at 5a-6a. After several years, McGill separated from that church and formed a church he calls "A Creation Seventh Day & Adventist Church" or "Creation Seventh Day Adventist Church." *Id.* at 6a. McGill is the pastor of this three-member church, which is associated with a second three-member church in Canada. *Ibid.* McGill also created internet domain names asso-

ciated with his church, including "7th-day-adventist.org," "creation-7th-day-adventist-church.org," "creation seventhday-adventistchurch. org," "creationsda.org," and "csda.us." *Ibid.* Although aware of SDA's trademarks, McGill has used names that infringe the Seventh-day Adventist and SDA trademarks without any license granted by the Corporation or the General Conference. *Ibid.*

The Litigation. Accordingly, on September 22, 2006, the General Conference and Corporation ("the Church") filed suit against McGill alleging trademark infringement, unfair competition, and dilution of marks under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a), 1125(c); cyber-squatting under 15 U.S.C. § 1125(d)(1); unfair and deceptive trade practices under the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101; common-law trademark infringement and unfair competition; and injury to business reputation and dilution of marks under Tenn. Code Ann. § 47-25-513.

McGill appeared *pro se* and filed his answer. Pet. 6a-7a; Dist. Ct. Dkt. Doc. 4. But he did not raise any defenses based on RFRA.[1] Dist. Ct. Dkt. Doc. 4. Shortly thereafter, on two occasions (November 29 and December 11, 2006), attorneys appeared on the record on behalf of McGill, but again did not raise RFRA. Dist. Ct. Dkt. Docs. 6-7. McGill served discovery responses and initial disclosures in February

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[1] RFRA precludes the federal government from substantially burdening a person's exercise of religion unless it can show that the burden: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)

2007, but again failed to raise RFRA. Dist. Ct. Dkt. Docs. 13-14. Then, when he was deposed in April 2007, McGill again did not mention RFRA as a possible defense. Dist. Ct. Dkt. Doc. 19. When McGill filed his expert report on August 6, 2007, he again failed to raise RFRA.

A year after suit was filed, McGill filed a motion to dismiss, asserting RFRA as a defense for the first time. Pet. 7a; Dist. Ct. Dkt. Doc. 30. In response to the Church's opposition, Dist. Ct. Dkt. Doc. 36, which showed that McGill had waived any defense under RFRA by failing timely to plead it, McGill requested leave to amend his pleadings. Dist. Ct. Dkt. Doc. 49. By that time, the deadline to amend pleadings had long passed, Dist. Ct. Dkt. Doc. 9, and the Church had already filed a motion for summary judgment. Dist. Ct. Dkt. Doc. 37.

The district court agreed with the Church that McGill was estopped from raising any defense under RFRA as a result of his failure timely to plead it. Dist. Ct. Dkt. Doc. 61. It therefore denied McGill's request to amend his pleadings, concluding that his original answer had not provided fair notice that he was relying on RFRA:

> In the present case, Defendant's answer does not give Plaintiffs "fair notice" that Defendant is relying on the RFRA as a defense. Although Defendant was pro se when he filed his answer, his attorneys filed notices of appearance shortly thereafter—on November 29, 2006, and December 11, 2006. However, defense counsel did not seek to amend the answer until almost a year later when the reply to Plaintiffs' response was filed on November 23, 2007. Defendant has offered no

> reason for the delay in seeking to amend his [answer]. Moreover, Plaintiffs' motion for summary judgment is pending and, thus, Plaintiffs would be prejudiced if the amendment is allowed.

Pet. 7a. The district court thus denied McGill's motion to dismiss. *Ibid.* It then granted the Church's motion for summary judgment with respect to the infringement claims as to "Seventh-day Adventist," but denied it with respect to "Adventist" and "SDA" on the basis that there were material facts left to be resolved. *Id.* at 7a-8a.

The parties agreed to mediate the remaining claims before the magistrate judge. *Id.* at 8a. But shortly before the mediation, McGill refused to appear, asserting now that his religious convictions did not allow him to attend. *Ibid.* One of his attorneys then withdrew. *Ibid.* The court ordered another mediation, but McGill again refused to attend. *Id.* at 9a. The Church moved for sanctions, including default judgment and permanent injunctive relief, and on May 28, 2009, the district court granted the motion, entering a default judgment order and injunctive relief. *Ibid.*

McGill moved to stay the injunction pending his appeal to the Sixth Circuit, but that motion was denied. Dist. Ct. Dkt. Doc. 103. Nevertheless, McGill still refused to comply with the injunction. See Dist. Ct. Dkt. Doc. 111. The Church thus applied for an order to show cause why McGill should not be sanctioned. Dist. Ct. Dkt. Doc. 105. McGill declined to attend the hearing to explain his actions and, instead, his attorney appeared only to enter general objections. See Dist. Ct. Dkt. Doc. 111. The district court held McGill in contempt for his willful failure to

abide by the court's orders. Dist. Ct. Dkt. Doc. 112. McGill continued to refuse to comply with the injunction, and in March 2010, the Church again applied for an order to show cause and for sanctions. See Dist. Ct. Dkt. Doc. 136. In June 2010 the magistrate judge recommended the motions be granted. *Ibid.*

The Sixth Circuit Decision. Meanwhile, McGill proceeded with his appeal, in which he now sought to press his RFRA argument. Pet. 10a. On appeal, the Church showed that, although McGill had specified entry of the default judgment as an error, he had waived any argument about the default because he had failed to argue for its reversal in his opening brief. *Ibid.* The Church further showed that, separate from McGill's waiver of his appeal of the default judgment, he had, as the trial court found, waived any defense under RFRA by failing timely to plead it. Appellate Ct. Dkt. Doc. 616312181, at 53-56.

The Sixth Circuit agreed that McGill had waived any argument that the default judgment should not have been entered. However, the court stated that it was not clear whether the default judgment superseded the summary judgment order, and on that basis concluded that the default judgment did not preclude its review of whether the Church's allegations, if accepted as true, were sufficient to state a claim and support a judgment of liability. Pet. 10a.

Moving to the RFRA issue, which the Church had not briefed on the merits,[2] the Sixth Circuit specifi-

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[2] In a footnote to its appellate brief, the Church noted that the Sixth Circuit had previously not ruled on whether RFRA applies to private parties. However, the Church itself took no position on that issue, instead resting on the ground that McGill was es-

cally noted that it was not reaching the question whether, as the trial court had concluded, McGill had waived this defense. *Id.* at 17a n.3. Instead, the Sixth Circuit concluded that it did not need to address the waiver issue because, in its view, RFRA does not apply as a matter of law to suits brought under the Lanham Act, *id.* at 20a-21a—a statute that can be enforced only by private parties and not by the federal government. *Ibid.*

In reaching this conclusion, the Sixth Circuit distinguished the Second Circuit's ruling in *Hankins* v. *Lyght*, 441 F.3d 96 (2d Cir. 2006), which had held that RFRA applied to a suit by a private party under the Age Discrimination in Employment Act ("ADEA"), Pub. L. No. 90-202, 81 Stat. 602. Pet. 19a. The Sixth Circuit concluded that *Hankins*' reasoning, right or wrong, simply does not apply to a lawsuit, like this one, brought under a statute that contains no provision for government enforcement:

> [T]he *Hankins* majority limited its holding to the application of RFRA vis-à-vis federal laws that can be enforced by private parties *and* the government. That case concerned an action under the ADEA by a clergyman who had been forced into retirement. The ADEA claim could have been brought by the EEOC, and the majority [in *Hankins*] sought to avoid disparate application of the statute based on who brings discrimination charges. There is no EEOC-like agency that can bring trademark-enforcement actions.

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topped from raising the defense, as the trial court had concluded. Appellate Ct. Dkt. Doc. 616312181, at 56 n.3.

Pet. 19a-20a (emphasis in original; citations omitted). The court went on to note that, even as to that limited ruling, "a different panel of the Second Circuit already has expressed 'doubts about *Hankins'* determination that RFRA applies to actions between private parties.'" *Id.* at 20a (quoting *Rweyemanu* v. *Cote*, 520 F.3d 198, 203 (2d Cir. 2008)).

On that basis, the Sixth Circuit panel proceeded to unanimously affirm the district court's denial of McGill's motion to dismiss, its grant of partial summary judgment in favor of the Church, and its default judgment against McGill. Pet. 32a.[3]

McGill's Subsequent Activities. Since the Sixth Circuit's decision, McGill has continued to willfully disobey the district court's orders. Despite having been ordered to cease using the Church's trademarks, McGill has continued to do so. And although he has relocated beyond the jurisdictional reach of the district court—to Africa—McGill has directed his agent in the United States, Lucan Chartier, to continue to disobey the court's orders.

Indeed, following a recent evidentiary hearing, the magistrate judge handling this litigation entered a Report and Recommendation on December 23, 2010, finding:

> According to the testimony of Mr. Chartier, Defendant McGill and he exchanged messages about his latest sign restorations in October. As such,

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[3] Contrary to McGill's claim, the Sixth Circuit did not conclude that "petitioner plainly has sincerely-held religious beliefs." Pet. 25. Indeed, because it concluded that neither the First Amendment's free-exercise clause nor RFRA applied to the Church's trademark claims as a matter of law, the court had no need to reach that question. *Id.* at 11a-21a.

> the Court again finds that Messrs. McGill and Chartier continue to operate in tandem to violate the District Court's Orders, and that their actions are intentional and in contempt of said orders. It is clear that Defendant McGill is able to instruct and manipulate his young protégé to accomplish these contemptible acts. It continues to be apparent that Defendant McGill accomplishes this from a distance, well beyond the reach of this Court.

Dist. Ct. Dkt. Doc. 160, at 2; see also Dist. Ct. Dkt. Doc. 162 (McGill's objections to magistrate report).

REASONS FOR DENYING THE PETITION

The decision below does not implicate any circuit split. As we explain in more detail below, most of the decisions on which McGill relies do not even address whether RFRA applies to private actions. And aside from the decision below, *none* decided whether RFRA applies to private actions where the underlying statute does not also provide for government enforcement. The Sixth Circuit's ruling was the first to decide that specific question, and its result does not conflict with the law in any other circuit.

The only actual split in the decisions McGill cites concerns a question that is not presented by this petition: whether RFRA applies to private lawsuits under statutes that *also* contemplate government enforcement. And even that split is narrow—involving only two circuits, the Second and the Seventh—and does not justify this Court's intervention. Indeed, the Second Circuit holding relied upon by McGill has more recently been criticized by another panel of that court, and there is a strong possibility that it will be overturned *en banc*, thus erasing the narrow split that now exists.

But even if this case did implicate a genuine circuit split, it suffers from fatal vehicle problems. For one, McGill's RFRA defense was waived before the district court. Moreover, his continued and willful failure to obey court orders resulted in a default judgment that independently resolved the claims against him. Thus, even if this Court were to reach the RFRA question and decide it in McGill's favor, that decision would likely have no effect on the underlying action. Finally, the Church's institutional interests as a religious body may prevent it from vigorously defending the Sixth Circuit's RFRA ruling on the merits, thus making more difficult the kind of adversarial debate that a grant of *certiorari* is intended to produce.

I. This Case Implicates No Circuit Split.

In his petition, McGill asserts that the Sixth Circuit's decision creates a 3-3 circuit split between the Second, Eighth and D.C. Circuits on one side, and the Fifth, Sixth, and Seventh Circuits on the other. Pet. 10-14. He is wrong. Indeed, he fails to acknowledge the critical distinction, recognized in most of the decisions he cites, between statutes that provide for government enforcement and those that do not.

1. Where the government can enforce a statute, some courts have held that RFRA, which is intended to ensure that the government does not burden religious exercise without compelling justification, applies even to suits between private parties. But no court has ever held that RFRA applies to suits between private parties where, as here, there is no possibility of government enforcement.

For this reason, there is no conflict between the ruling below and the Second Circuit's decision in

Hankins v. *Lyght*, 441 F.3d 96 (2d Cir. 2006). See Pet. 11-12. *Hankins* involved a claim under the ADEA, which provides for government enforcement actions through the EEOC. See 29 U.S.C. § 626. Although the lawsuit in *Hankins* was brought by a private plaintiff—a clergyman challenging his early retirement—the same claim could have been brought as a government enforcement action by the EEOC.

As the Sixth Circuit noted below, moreover, "the *Hankins* majority limited its holding to the application of RFRA vis-à-vis federal laws that can be enforced by private parties *and* the government." Pet. 19a (emphasis in original). That holding does not apply to the situation presented here because, as the Sixth Circuit noted, "[t]here is no EEOC-like agency that can bring trademark-enforcement actions." Pet. 20a.

Indeed, the Second Circuit in *Hankins* expressly recognized that it was addressing only situations where government enforcement of a statute was a possibility:

> We need not, however, decide whether the RFRA applies to a federal law enforceable only in private actions between private parties. The ADEA is enforceable by the EEOC as well as private plaintiffs, and the substance of the ADEA's prohibitions cannot change depending on whether it is enforced by the EEOC or an aggrieved private party.

441 F.3d at 103. The *Hankins* majority's principal concern—that the scope of statutory rights should not differ based on whether they are enforced by a private party or by the government—simply does not

apply where, as here, the statute does not provide for government enforcement.

More recently, the Second Circuit again confirmed that the holding in *Hankins* is limited to a statute enforceable by the federal government itself. In *Rweyemamu* v. *Cote*, 520 F.3d 198, 203 (2d Cir. 2008), that court characterized *Hankins* as a "determination that RFRA applies to actions between private parties when the offending federal statute is enforceable by a government agency." That analysis confirms that the Second Circuit's holding in *Hankins* would not apply here, where the trademark statutes at issue contain no government enforcement provision.

2. McGill is also incorrect to assert a conflict with the Eighth Circuit's ruling in *Christians* v. *Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), which involved a lawsuit by a bankruptcy trustee challenging the debtor's contribution to her church as a fraudulent transfer. Pet. 12-13. The *Christians* cases, decided shortly after RFRA's enactment, did not even discuss whether RFRA applies to suits by private parties. Those cases addressed only whether RFRA was constitutional and could be applied retroactively. *Christians*, 82 F.3d at 1416-17; *Christians* v. *Crystal Evangelical Free Church*, 141 F.3d 854, 859-63 (8th Cir. 1998).

Nor is there any basis for McGill's claim that in *Christians*, the Eighth Circuit ruled *sub silentio* that all private actions against religious institutions must be subject to the strictures of RFRA. A bankruptcy trustee—who was the plaintiff in *Christians*—is not a true private party, but instead acts on behalf of the

government and in the public interest. As the Second Circuit noted in *Hankins*:

> A bankruptcy trustee is arguably "acting under color of law" and therefore falls within the RFRA's definition of "government." 42 U.S.C. § 2000bb-2(1). United States trustees are part of the executive branch and protect the interests of the United States in the liquidation. See 28 U.S.C. § 586(a); 11 U.S.C. §§ 701(a)(1), 703(b)-(c) and 704(9); *In re Schoenewerk*, 304 B.R. 59, 62-63 (Bankr. E.D.N.Y. 2003).

441 F.3d at 103 n.4.[4] Thus, the holding of *Christians*, like those of *Hankins* and *Rweyemamu*, does not conflict with the Sixth Circuit's determination that RFRA does not apply where there is no possibility of government enforcement.

3. Finally, McGill suggests a conflict between the decision below and the D.C. Circuit's holding in *EEOC* v. *The Catholic University of America*, 83 F.3d 455, 457 (D.C. Cir. 1996), a case in which Catholic

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[4] Accord, *e.g.*, *United States* v. *Luporace*, 133 F.3d 541, 545 n.1 (7th Cir. 1998) (bankruptcy trustee is a "a court-appointed fiduciary serving in the public interest" with a "public role"); *Taunt* v. *Barman (In re Barman)*, 252 B.R. 403, 412-413 (Bankr. E.D. Mich. 2000) (holding that Fourth Amendment protections extend to search carried out by bankruptcy trustee because "every aspect of a trustee's position and function is subject to either statutory obligation or to federal executive or judicial branch control" and "these circumstances surrounding the status and function of a trustee in a chapter 7 case all suggest a sufficient nexus to the government and its power"); *Novak* v. *Clark*, No. 03-4136-JAR, 2004 WL 1293249, at *2 n.13 (D. Kan. June 4, 2004) (holding that Chapter 7 bankruptcy trustee was entitled to quasi-judicial immunity for acts "taken in his capacity as court-appointed trustee and at the direction of the United States Bankruptcy Court").

University was alleged to have discriminated against a female professor. Pet. 13. But like the Eighth Circuit in *Christians*, the D.C. Circuit did not speak to the question whether RFRA applies to private lawsuits, but rather only to whether the statute was constitutional and could be applied retroactively. *Id.* at 468-69.

Moreover, like *Christians*, the *Catholic University* case involved a statute (Title VII of the Civil Rights Act of 1964) that was and remains subject to government enforcement. See 42 U.S.C. § 2000e-5(f); *Gen. Tel. Co. of N.W.* v. *EEOC*, 446 U.S. 318, 325 (1980). Indeed, the EEOC was itself a plaintiff in the case. *Catholic University*, 83 F.3d at 459. Accordingly, nothing in *Catholic University* conflicts with the Sixth Circuit's holding that RFRA does not apply to private lawsuits under statutes with no provision for government enforcement.

4. Contrary to McGill's argument (at 13), the decisions he cites from the Fifth and Seventh Circuits are equally inapplicable here, for they likewise do not address statutes that create no possibility of government enforcement.[5] For example, in the Seventh Circuit case, *Tomic* v. *Catholic Diocese of Peoria*, a church music director sued for age discrimination under the ADEA, a statute enforceable by the federal government. 442 F.3d 1036, 1037 (7th Cir. 2006). To

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[5] Because, as McGill concedes, see Pet. 14, the Ninth Circuit has expressly refused to decide whether RFRA applies to *any* private litigation, its opinions obviously cannot create a circuit split. See, *e.g.*, *Worldwide Church of God* v. *Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir 2000) ("We need not decide this knotty question, however, for in the context of this case PCG has failed to demonstrate that the copyright laws subject it to a substantial burden in the exercise of its religion.").

be sure, the Seventh Circuit disagreed with the Second Circuit, concluding that RFRA does not apply to private lawsuits even where government enforcement is possible. *Id.* at 1042. But again, that is a different issue than the one decided by the Sixth Circuit in this case, which dealt only with the effect of RFRA on statutes that are *not* subject to government enforcement.

As for the Fifth Circuit, McGill cites *Boggan* v. *Mississippi Conference of the United Methodist Church*, an employment discrimination appeal decided by an unpublished, two-paragraph, *per curiam* opinion. 222 Fed. App'x 352 (5th Cir. 2007). *Boggan* did not discuss the applicability of RFRA to private suits. Rather, it held that the plaintiff minister's action was "barred by the so-called minister-clergy exception, which is firmly rooted in the Free Exercise clause of the First Amendment to the United States Constitution." *Id.* at 353. And, in any event, the case involved an action under Title VII, which as noted can be enforced by the federal government.

In short, if there is any circuit split on RFRA's application, it is not the 3-3 circuit split asserted by McGill. At most, there is a disagreement between the Second and the Seventh Circuits on the question whether RFRA applies to a private action under a statute that *also* provides for government enforcement. But as we have explained, that question is not presented by this case.

As to the issue that the Sixth Circuit did address—whether RFRA applies when government enforcement of a statute is *not* a possibility—the Sixth Circuit is the only circuit court to have decided this question. In every other case cited by McGill,

the federal government either was or could have been a party. The Sixth Circuit's holding is thus unique, and it is not in conflict with the decisions of the Second, Eighth, or D.C. Circuits.

5. McGill may respond that the possibility of government enforcement is irrelevant to a litigant claiming that his free exercise of religion has been infringed. Pet. 15-17. But McGill's conviction that the Sixth Circuit was wrong about this cannot create a circuit split where there is none.

In fact, the court below based its ruling on the conclusion that RFRA embodies a congressional desire for the *government* to remain "neutral" and "not substantially burden religious exercise without compelling justification." *Id.* at 19a (quoting 42 U.S.C. § 2000bb(a)). And that was the court's rationale for drawing a distinction between statutes that permit government enforcement and those that do not. *Id.* at 19a-20a.

For purposes of McGill's petition, it does not matter whether the Sixth Circuit was correct to carve at this joint. What matters is that the Sixth Circuit left open the possibility that it would rule differently in a case in which government enforcement *is* possible, just as the Second Circuit in *Hankins* left open the possibility that it would rule differently in a case in which government enforcement is *not* possible. There simply is no conflict between these two positions.

II. Whatever Split Does Exist Is Not Only Shallow, But Also Likely To Be Fleeting.

Even the disagreement that does exist among the lower courts is both shallow and ephemeral.

1. Of the cases cited by McGill, only two—the Second Circuit's ruling in *Hankins* and the Seventh Circuit's ruling in *Tomic*—squarely address the question of whether RFRA applies to actions by private parties—albeit both in the context of statutes that also provide for government enforcement. Of course, this Court could not resolve the disagreement between those two courts by granting review in this case, as the Sixth Circuit's ruling involves a statute with no government enforcement provision, and is thus on neither side of that split.

But even if the Court were inclined to overlook that dispositive fact, the shallowness of the split and the paucity of reasoned opinions from the lower courts would still counsel against granting review here, and in favor of awaiting further percolation in the courts of appeals. As Justice Brennan noted, where a circuit split exists but is still shallow, the law should be allowed to develop: "[T]here is already in place, and has been ever since I joined the Court, a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." E. Gressman, K. Geller, S. Shapiro, T. Bishop & E. Hartnett, *Supreme Court Practice* 246 (9th ed. 2007) (quoting William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 *Judicature* 230, 233 (1983)).

2. That is especially true where, as here, the disagreement is not only limited, but likely fleeting. While it is true that the Second Circuit held in *Hankins* that RFRA applies to suits between private parties where the government could be a party, it did so over then-Judge Sotomayor's vigorous dissent. 441 F.3d at 114 (Sotomayor, J., dissenting) ("RFRA

by its terms does not apply to suits between private parties.").

The dissent's view was subsequently embraced by another panel of that same court. In *Rweyemamu*, the unanimous panel concluded that it did not have to decide whether RFRA applied to a private party suit because the defendant (like McGill here) had waived RFRA as a defense. 520 F.3d at 203-04. Nevertheless, it expressed its "doubts about *Hankins*'s determination that RFRA applies to actions between private parties when the offending federal statute is enforceable by a government agency." *Id.* at 203; see also *id.* at 203 n.2 ("we do not understand how [RFRA] can apply to a suit between private parties, regardless of whether the government is capable of enforcing the statute at issue").

McGill argues that *Rweyemamu* could not have overruled *Hankins* because a panel of a court of appeals is bound by a decision of a prior panel. Pet. 12 n.2. Of course. But that misses the point: What matters is that in a *future* case, the Second Circuit may well vote *en banc* to overrule its controversial 2-1 opinion in *Hankins*. If it does so, whatever circuit split there is now will vanish.

Given the shallowness of the split and the real possibility that it may soon resolve itself, there is no compelling need for this Court's intervention.

III. Even If There Were A Circuit Split Deserving Of Review, This Case Is The Wrong Vehicle.

Even if the matters McGill raises otherwise warranted review, this case would not be a suitable vehicle. For one, if this Court wished to address the narrow disagreement between the Second and Seventh Circuits, it would be better to grant review in

an employment discrimination suit, where government enforcement is a possibility, and which would present the same fact pattern that was present in both *Hankins* and *Tomic*. As the Rutherford Institute's *amicus* brief reflects, this is the setting in which RFRA's applicability to private lawsuits most often arises. See Br. of *amicus curiae* Rutherford Institute 4-7, 9-13.[6] Given that the question of RFRA's applicability to private suits overwhelmingly arises in that setting, it would make more sense to grant *certiorari*—if it is to be granted at all—in a case arising in that same context.

Beyond that, this case is an extremely poor vehicle for resolving the issue presented, for three additional reasons.

A. McGill waived his RFRA argument before the district court.

First, as explained previously, *supra* 4-5, the district court expressly held that McGill had waived, and was therefore estopped from asserting, RFRA as a defense. The district court explained that McGill had failed to include the defense in his answer; that he did not seek to amend his answer until almost a year later, after the deadline for amendment had passed; and that to allow the amendment at that late date would unfairly prejudice the Church, which had already submitted its motion for summary judgment pending. Dist. Ct. Dkt. Docs. 61. The Sixth Circuit

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[6] Indeed, the great majority of cases relied on by McGill involved employment discrimination actions based on statutes that either were, or could have been, enforced by the government. See *Boggan*, 222 Fed. App'x at 353 (Title VII); *Tomic*, 442 F.3d at 1037 (ADEA); *Hankins*, 441 F.3d at 103 (ADEA); *Catholic Univ. of Am.*, 83 F.3d at 457 (Title VII).

did not disturb that waiver finding. Indeed, the court of appeals did not even consider the issue, finding it unnecessary to rule on waiver because it decided RFRA did not apply as a matter of law. Pet. 20a.

Thus, if this Court were to grant review to consider the applicability of RFRA and reverse the Sixth Circuit on that point, it would likely have no effect on the outcome of this case, because McGill is independently estopped from relying on that defense. At the very least, this Court would have to remand to the court of appeals to consider, for the first time, the trial court's finding of waiver, thus making it likely that this Court's holding would be irrelevant to the very case in which it would have been entered.

This Court routinely denies review on questions that have not been preserved in the courts below. See, *e.g.*, *City of Springfield, Mass.* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted: Court "ordinarily will not decide questions not raised or litigated in the lower courts," including where, contrary to Fed. R. Civ. P. 51, "the party seeking to argue the issue has failed to object to a jury instruction"). Just as Rule 51 requires a party to object to a jury instruction, Rule 8 requires a party to "affirmatively state" any "affirmative defense," see Fed. R. Civ. P. 8, and, in fact, McGill has *already* been found to have waived any RFRA defense on this basis.

McGill is thus asking this Court to grant review to consider the application of a defense that the trial court ruled he waived, and that the Church did not even brief the issue before the court of appeals. If, as McGill and his *amicus curiae* contend, the issue presented by this case is "recurring and widespread,"

then there will be no shortage of better vehicles in the future. Pet. 14.

B. McGill's claims were independently resolved by the district court's default judgment.

McGill not only waived his RFRA defense, but as a result of his willful disobedience of the trial court's orders, a default judgment was entered against him. As previously explained, *supra* 5-6, after McGill twice refused to attend court-ordered mediation to discuss a possible settlement, the trial court entered an order granting the Church default judgment and permanent injunctive relief. Pet. 9a. On appeal, the Sixth Circuit determined that McGill had waived any challenge to the default judgment order because he failed to brief it. *Id.* at 10a. Because the default judgment independently resolved the claims in this case,[7] any decision by this Court would be purely advisory,

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[7] The Sixth Circuit's uncertainty on this point was misguided. The district court's partial summary judgment was an interlocutory order that remained subject to revision until the entry of final judgment. Fed. R. Civ. P. 54(b); *Mallory* v. *Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991); see *Marconi Wireless Tel. Co.* v. *United States*, 320 U.S. 1, 47 (1943). Thus, when the trial court subsequently entered a default judgment, there was no reason to think it was carving out from that judgment the issues it had addressed in its previous partial summary judgment. To the contrary, that default judgment was an alternative and ultimately dispositive basis for dismissing McGill's claims.

That conclusion is confirmed by the district court's subsequent decision denying McGill's motion to stay the injunction pending appeal. There the district court noted that, in the end, the "case was not decided on the merits of the claims," and it therefore concluded that McGill's First Amendment argument was "irrelevant to the substantive issues that will be decided on appeal." See Dist. Ct. Dkt. Doc. 103, at 3.

making this a doubly poor vehicle for a grant of *certiorari*.

And even if the default order did not independently resolve the claims at issue, McGill's willful disobedience of the district court's orders provides an independent basis to deny review, especially considering that McGill persists in such conduct even to this day. Ever since the district court and the Sixth Circuit ruled in the Church's favor, McGill has willfully disobeyed their decisions, continuing to use the Church's trademarks on signs and on the Internet. As the magistrate judge observed in a recent hearing, since moving to Africa, McGill has "instructed and otherwise aided [his deputy] Chartier to perform these acts in violation of the District Court's Orders." Dist. Ct. Dkt. Doc. 160, at 3. The magistrate observed that "Mr. Chartier readily conceded his actions were in violation of the District Court's Orders, and testified that he will continue to violate these orders." *Id.* at 1-2. The magistrate ultimately found McGill to be in contempt of court, explaining that "this Court can no longer ignore the continuing and contemptible violations of the District Court Orders by both Defendant McGill and Mr. Chartier." *Id.* at 3, 5.

It is one thing for a litigant to disagree with a court's order, but quite another to disrespect and disobey that order. Having flouted the authority of the lower courts, McGill now seeks the intervention of this, the nation's highest Court. This Court should not indulge a petitioner who comes before it with such unclean hands. See *Olmstead* v. *United States*, 277 U.S. 438, 483-484 (1928) (Brandeis, J., dissenting) ("[A] court will not redress a wrong when he who invokes its aid has unclean hands."), *overruled on*

other grounds by Katz v. *United States*, 389 U.S. 347 (1967); see also *ABF Freight Sys.* v. *NLRB*, 510 U.S. 317, 329-330 (1994) (Scalia, J., concurring) ("The 'unclean hands' doctrine 'closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.'") (citation omitted).

C. For reasons of institutional policy, the Church may not be able to defend the Sixth Circuit's RFRA analysis.

A final reason why this case would be a poor vehicle for addressing the question presented is that, for institutional reasons, the Church may not be able to defend the Sixth Circuit's RFRA analysis if review were granted.

Because the Church is a religious organization and a staunch supporter of religious freedom, the Church's institutional interests favor a broad interpretation of RFRA. The Church has been among the most vocal proponents of RFRA, both before and since its enactment. Indeed, the Church has joined with other religious institutions in *amici* briefs before this Court and others to advocate a broad interpretation of RFRA in numerous cases—including, for example, the *Christians* case discussed above.[8] As a

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[8] See Supplemental Br. of *amici curiae* Christian Legal Society, The Nat'l Assoc. of Evangelicals, Americans United for Separation of Church and State, Concerned Women for Am., The Baptist Joint Comm. on Public Affairs, The Southern Baptist Convention, The Gen. Conference of Seventh-day Adventists, and The Evangelical Lutheran Church in Am. in Support of Def. Appellant, *Christians* v. *Crystal Evangelical Free Church*, No. 93-2667 (8th Cir. Dec. 10, 1993); see also Br. of the Resp. in Opp'n, *Clapper* v. *Chesapeake Conference of Seventh-day Ad-*

matter of institutional policy, therefore, it is entirely possible that the Church would not be able to defend the Sixth Circuit's RFRA analysis if review were granted.[9]

This institutional conflict provides an additional reason to select a different case for review, if review of this question is warranted at all. As this Court has often recognized, vigorous debate is critical to the Court's determination of which of two competing views should become the law of the land. In *United*

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ventists, No. 98-1566 (U.S. Oct. 1998); Br of The Baptist Joint Comm. for Religious Liberty, The Nat'l Assoc. of Evangelicals, The National Council of Churches, The American Jewish Comm., The Stated Clerk of the Gen. Assembly of the Presbyterian Church (U.S.A.), The Gen. Conference of the Seventh-day Adventists, and the United States Conference of Catholic Bishops as *amicus curiae* in Support of Cross-Appellees Urging Affirmance on the Cross Appeal, *Rasul* v. *Rumsfeld*, No. 06-5222 (D.C. Cir. Mar. 16, 2007); Br. *amicus curiae* of James E. Andrews, as Stated Clerk of the Gen. Assembly of the Presbyterian Church (U.S.A.), The Church of Jesus Christ of Latter-day Saints, The Church of the Nazarene, The Comm'n of Social Action of Reform Judaism, The Evangelical Lutheran Church in Am., The First Church of Christ, Scientist, The Gen. Conference of the Seventh-day Adventists, The General Conference on Finance and Administration of the United Methodist Church, and The Worldwide Church of God, in Support of the Pet for a Writ of *Mandamus*, *U.S. Catholic Conference, Inc.* v. *Ashby*, No. 95-0250 (Tex. Nov. 15, 1995).

[9] The Church took care in its briefing to the court of appeals not to argue against a broad application of RFRA, but rather to urge affirmance on grounds of waiver. See Appellate Ct. Dkt. Doc. 616312181, at 56 n.3. The Church's attorneys did not take such care before the trial court, where, although the principal argument was waiver, part of the language can be read as opposing an expansive application of RFRA. See Dist. Ct. Dkt. Doc. 36, at 10-13. But the Church would not consider itself bound by that position before this Court.

States v. *Johnson*, for example, this Court vacated a judgment in a case in which the defendant had invited the plaintiff to file a "friendly suit" that was "not in any real sense adversary." 319 U.S. 302, 304-05 (1943). The Court did so because the suit lacked "the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court." *Id.* (1943) (quoting *Chicago & Grand Trunk Ry. Co.* v. *Wellman*, 143 U.S. 339, 345 (1892)); see also *Poe* v. *Ullman*, 367 U.S. 497, 506 (1961).

This case does not involve a "friendly suit." But where institutional policy may preclude the Church from vigorously defending the Sixth Circuit's RFRA analysis, thereby depriving this issue of the adversarial debate it deserves, the rationale of *Johnson* applies with equal force. And if, as McGill and *amicus curiae* contend, this issue is "recurring and widespread," then there will be no shortage of better vehicles in the future. Pet. 14.

CONCLUSION

In sum, this case presents no issue worthy of this Court's review. And even if the case did present such an issue, it would be an unusually poor vehicle for resolving it. The petition for a writ of *certiorari* should be denied.

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No. 10-902

In The Supreme Court of the United States

WALTER MCGILL, PETITIONER,

v.

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS AND THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AN UNINCORPORATED ASSOCIATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' refusal to defend the court of appeals' plainly erroneous holding—that the Religious Freedom Restoration Act (RFRA) does not apply to federal civil actions in federal court unless the federal government is a party—is no reason to deny review. Their silence does not negate the need to resolve the acknowledged conflicts in the courts and establish a uniformly broad reading of this remedial statute.

Nor is there anything that makes this case a poor vehicle to decide the issue. The Sixth Circuit relied solely on the legal issue regarding scope of RFRA in ruling against petitioner, and if petitioner is correct that his conduct is protected by RFRA, then any civil contempt order will be nullified.

A. The Court Of Appeals' Decision Addresses A Recurring Question In A Common Factual Circumstance

Rather than defend the holding of the Sixth Circuit, respondents acknowledge that the court of appeals' holding is in tension with respondents' status as "staunch supporter[s] of religious freedom." Br. in Opp. 23. It is so contrary to their normally "broad interpretation of RFRA" (Br. in Opp. 23), that they intimate—but do not go so far as to state—that they would not defend the Sixth Circuit on the merits if certiorari is granted. Br. in Opp. 23, 24, 25.

Respondents suggest (Br. in Opp. 2) their presence as plaintiffs seeking to enforce federal law against

other religious persons is anomalous. Yet these respondents routinely appear in federal court as plaintiffs, seeking to enforce their alleged federal intellectual property rights against other religious persons. *See, e.g.*, *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228 (9th Cir. 1989); *General Conference Corp. of Seventh-Day Adventists v. Federation of Jewish Adventist Soc'y*, No. 3:08-cv-02170 (S.D. Cal. Mar. 13, 2009), ECF No. 23 (settlement agreement); *General Conference Corp. of Seventh-Day Adventists v. Trinidad Adventist Church*, No. 1:08-cv-01402 (D.D.C. Dec. 29, 2008), ECF No. 11 (consent decree); *General Conference Corp. of Seventh-Day Adventists v. Perez d/b/a Eternal Gospel SDA Church*, 97 F. Supp. 2d 1154 (S.D. Fla. 2000); *General Conference Corp. of Seventh-Day Adventists v. Emanuel Seventh Day Adventist Church*, No. 1:98-cv-02558 (S.D.N.Y. Aug. 26, 1998), ECF No. 9 (default judgment); *General Conference Corp. of Seventh-day Adventist v. Seventh-day Adventist Kinship Int'l, Inc.*, No. 87-8113, 1991 WL 11000345 (C.D. Cal. 1991).

Other churches and religious organizations likewise regularly use federal courts and federal law to police the use of what they claim is their intellectual property. *See, e.g.*, *Community of Christ Copyright Corp. v. Devon Park Restoration Branch of Jesus Christ's Church*, No. 10-1707, 2011 WL 941469 (8th Cir. Mar. 21, 2011); *National Spiritual Assembly of*

Baha'is of United States Under Hereditary Guardianship, Inc. v. National Spiritual Assembly of the Baha'is of United States, Inc., 628 F.3d 837 (7th Cir. 2010); *see also* Amicus Br. of The Rutherford Inst. at 14-16 (collecting additional cases).

As amicus The Rutherford Institute explains (at 13-14), unlike federal employment law, which has both statutory and judicially-crafted doctrines that alleviate the burden of generally applicable laws on religious employers, federal intellectual property law offers no protection to persons of faith. Thus, resolving the question whether defendants in such suits are entitled to invoke RFRA's protections is an issue that will substantially clarify the rights of religious persons on both sides of such litigation.[1]

B. Contrary To Respondents' Claim, The Courts Of Appeals Are Divided On The Scope Of RFRA

The circuits are divided on the scope of RFRA. Respondents admitted it below. In their court of appeals' brief, respondents stated that the Sixth Circuit

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[1] If certiorari is granted, this Court has the tools to assure that the Sixth Circuit's holding is defended even if respondents follow through on their suggestion that they would support the position of the petitioner on the merits, as contemplated by this Court's Rule 12.6. This Court has regularly appointed an amicus to defend a lower court's holding in cases in which nongovernmental respondents will not do so. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 129 S. Ct. 1693 (2009) (mem.); *Great-West Life & Annuity Ins. Co. v. Knudson*, 532 U.S. 917 (2001) (mem.).

had "never ruled that RFRA applies to cases between private parties and *courts in other circuits are split*." Resp. C.A. Br. 56 n.3 (emphasis added); *see also* Br. in Opp. 24 n.9 (citing this footnote as part of respondents' considered approach in the court of appeals). In their brief in opposition, respondents continue to admit there is a split (Br. in Opp. 1, 9, 15), but they erroneously claim it does not extend to this case.

Respondents agree that, like the Sixth Circuit below, the Seventh Circuit has held that unless the federal government is a party to the action, RFRA's defense is not available to a defendant. Br. in Opp. 14-15 (citing *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir.), cert. denied, 549 U.S. 881 (2006)).[2]

By contrast, the Eighth Circuit held that RFRA applied to an action in federal court because the federal courts are part of the "government" governed by RFRA. Pet. 12 (citing *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407 (8th Cir. 1996), vacated, 521 U.S. 1114 (1997), reinstated, 141 F.3d 854 (8th Cir.), cert. denied, 525 U.S. 811 (1998)).

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[2] The Sixth Circuit read two Ninth Circuit decisions to reach the same conclusion. Pet. App. 20a-21a. As the petition explained (Pet. 14) and respondents agree (Br. in Opp. 14 n.5), however, the Ninth Circuit formally left the issue open even while expressing doubts that a defendant could rely on RFRA absent the federal government as a party.

Respondents claim (Br. in Opp. 12) that that decision was only focused on the question of whether RFRA applied to that case based on its timing (where the judicial proceeding was initiated before RFRA was enacted). In deciding whether the RFRA applied, the court had to decide whether "the implementation of [any federal] law" occurred after RFRA's effective date. 42 U.S.C. § 2000bb-3(a). The Eighth Circuit concluded that "the federal courts are a branch of the United States, and our decision in the present case would involve the implementation of federal bankruptcy law." *Christians*, 82 F.3d at 1417.

Respondents additional suggestion (Br. in Opp. 12-13) that the Eighth Circuit in that case *could* have relied on the bankruptcy trustee's status as a person acting under color of law is irrelevant. That was not the basis of the court's holding.

Moreover, the Second Circuit and D.C. Circuit have both permitted invocation of RFRA's protections by defendants sued by private parties. Pet. 11, 13 (citing *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996)). To be sure, those cases involved federal statutes that allowed both the federal government and a private person to enforce a substantive federal standard. But nothing in the courts' reasoning limited RFRA's scope to those situations. While *Hankins* reserved the question for another day, there is nothing in the text of RFRA that could make it applicable only to those federal laws that *could be* enforced by

the federal government in federal court. And certainly the D.C. Circuit made no such distinction.

Respondents further speculate (Br. in Opp. 18), that the split they acknowledge may vanish because the Second Circuit "may well vote *en banc* to overrule" *Hankins*. That is an odd argument for them to make, because respondents joined an amicus brief in the Second Circuit that urged the court of appeals that *Hankins* was correct in holding that "RFRA operates to restrict the exercise of governmental power, and so may apply even in disputes between private parties where the government's powers are invoked." Br. of Amicus Curiae of the Salvation Army National Corp. et al. at 14 n.9, *Rweyemamu v. Cote*, No. 06-1041, 2006 WL 6222112 (2d Cir. June 21, 2006).

But, in any event, that would not eliminate the D.C. Circuit's opinion, which held that a private plaintiff's federal claim (as well as the federal government's claim) was barred by RFRA. *See Catholic Univ.*, 83 F.3d at 470. Nor would it eliminate the Eighth Circuit's decision holding that federal court involvement is sufficient. *See Christians*, 82 F.3d at 1417.

C. This Case Cleanly Presents The Question Regarding The Scope Of RFRA

Respondents point to three case-specific factors that, they claim, make this case a poor vehicle. They are mistaken.

1. Respondents first contend that petitioner waived his RFRA defense by not raising it in a timely

fashion in the district court. Br. in Opp. 19-20. The court of appeals, however, elected to reach the merits of the RFRA claim, and expressly decided not to address respondents' waiver argument. Pet. App. 17a n.3. Because the RFRA issue was pressed by petitioner *and* passed on by the court of appeals on the merits, the issue is properly presented for this Court's review. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Moreover, petitioner did not waive reliance on RFRA by failing to expressly invoke the statute in his answer. Federal Rule of Civil Procedure 8(b) provides that a party must state "in short and plain terms its defenses." Petitioner did precisely that. In his *pro se* answer, petitioner pled as an affirmative defense that his "religion mandates the use of CREATION SEVENTH DAY ADVENTIST to describe [his] faith and practice of religion" and thus respondents' "claims would infringe the First Amendment to the U.S. Constitution." Dt. Ct. Dkt. 2 ¶ 71. Even though the First Amendment, rather than RFRA, was invoked, this defense put respondents on notice that petitioner was putting at issue the burden the respondents' proposed relief would have on his sincerely-held religious beliefs. That is all that is required. *See Blonder-Tongue Labs. Inc. v. University of Ill. Found.*, 402 U.S. 313, 350 (1971) (the purpose of Rule 8 requiring affirmative defenses to be plead in answer "is to give the opposing party notice"). As this Court recently explained in interpreting Rule 8(a), a statement will meet the "short and plain" statement

requirement without "an exposition of [the parties'] legal argument" or "pin[ning] [a] claim for relief to a precise legal theory." *Skinner v. Switzer*, No. 09-9000, 2011 WL 767703, at *6 (U.S. Mar. 7, 2011).

Furthermore, Sixth Circuit case law would have led petitioner to believe he could raise this affirmative defense in a motion, even if not expressly raised in the answer. *See Golden v. Commissioner of Internal Revenue*, 548 F.3d 487, 494 (6th Cir. 2008) (affirmative defense may be "raised by motion"); *Huss v. King Co.*, 338 F.3d 647, 652 (6th Cir. 2003) ("If a plaintiff receives notice of an affirmative defense by some means other than pleadings, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice."); *Smith v. Sushka*, 117 F.3d 965, 969 (6th Cir. 1997) ("Although [defendant] did not raise either defense before the second motion for summary judgment, we do not believe this is fatal. Failure to raise an affirmative defense by responsive pleading does not always result in waiver."); *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993) ("It is well established, however, that failure to raise an affirmative defense by responsive pleading does not always result in waiver.").

2. Respondents also argue that the district court's injunction against petitioner could be sustained on grounds apart from the merits of the trademark dispute, *i.e.*, that the district court entered a default judgment based on petitioner's refusal to mediate his claim. Br. in Opp. 21-22. But the court of appeals disagreed. It held "given that [petitioner]

fully and properly litigated the summary-judgment stage, we take the summary judgment order as properly before" the court on the merits. Pet. App. 28a. It rejected respondents' contention that "the default-judgment order superseded the summary judgment order." Pet. App. 10a.

Furthermore, the Sixth Circuit correctly held that even if the injunction was based on the entry of a default judgment, it was still obliged to look at the merits question because entry of a default judgment is appropriate only when the facts alleged are sufficient to support a judgment of liability. Pet. App. 10a; *Ohio Cent. R.R. Co. v. Central Trust Co.*, 133 U.S. 83, 91 (1890) ("[A]lthough the defendant may not be allowed, on appeal, to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the bill, or from insisting that the averments contained in it do not justify the decree."); 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2688 (3d ed. 2010) ("Even after default, * * * it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.").

Additionally, the entry of the default judgment was a sanction for petitioner failing to attend a mediation session agreed to by petitioner's then-counsel without petitioner's agreement. But petitioner, who was already on mission in Africa at the time, explained that returning to negotiate over the name of

his church would be contrary to his sincere belief that the name of his church was dictated to him by divine revelation. Dt. Ct. Dkt. 71 at 2; Dt. Ct. Dkt. 89 at 3. If petitioner is correct that RFRA does govern the conduct of the district court in this action, then the entry of default judgment itself would be subject to reexamination since petitioner will be able to show that requiring him to participate in mediation would have substantially burdened his sincerely-held religious beliefs.

3. Relatedly, respondents suggest that petitioner's post-judgment conduct weighs against hearing this petition. Br. in Opp. 22. But, as respondents' reference in passing, the facts surrounding petitioner's conduct are disputed. Br. in Opp. 9. A magistrate judge made recommendations to the district court in December 2010 that petitioner be found in contempt for "instruct[ing]" a third party (Mr. Lucan Chartier) to violate the court's injunction not to use the term "Seventh-day Adventists" in the sign for the church. Br. in Opp. 9 (quoting Dt. Ct. Dkt. 160 at 2).[3]

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[3] The magistrate judge also determined that petitioner was ignoring "the numerous exhortations within [the] Bible for believers to obey the civil authorities, institutions and law." Dt. Ct. Dkt. 160 at 4 n.1 (citing Romans, Peter, Titus, and Matthew). The magistrate judge went on to find that "Acts 4 and 5 of the Bible [which] involve Peter and others disobeying civil authority when they are ordered not to speak of Jesus or in His name" were "clearly *not* analogous to the present case." *Id.* at 5 n.2. Petitioner has urged the district court that these statements raise independent concerns regarding the approach adopted by the magistrate judge to this case.

That recommendation, and the underlying findings, are currently on appeal before the district court on de novo review. 28 U.S.C. § 636(b)(1).

Moreover, petitioner would be properly pursuing this appeal from the injunction even if he has not complied with all its strictures. If the district court's injunction is reversed, then any civil contempt orders flowing from that injunction will also be negated, because civil contempt orders only serve to attain prospective compliance with the injunction. *See United States v. United Mine Workers*, 330 U.S. 258, 294-295 (1947); *Worden v. Searls*, 121 U.S. 14, 27 (1887); *Stenberg v. Cheker Oil Co.*, 573 F.2d 921 (6th Cir. 1978). (A different rule applies to criminal contempt orders, which attempt to punish a person for past conduct, but respondents do not argue that the district court has imposed any such orders.)

Petitioner recognizes that he may have to face civil consequences from the federal courts if this Court refuses to review this case and the injunction remains in effect. But when Congress enacted RFRA, it intended to reduce those circumstances in which persons are forced to choose between their obligations to civil authority and their obligations to God. Review is warranted to give RFRA its intended breadth.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

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In The Supreme Court of the United States

WALTER MCGILL,

Petitioner,

v.

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia.[1] Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed, and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because the decision by the U.S. Court of Appeals for the Sixth Circuit erodes the protections for the free exercise of religion that Congress set forth when it enacted the Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488. The Rutherford Institute has represented, and continues to represent, individuals, religious assemblies, and institutions that are the intended beneficiaries of RFRA.

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[1] No counsel for a party authored this *amicus curiae* brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. By letters dated January 31, 2011, the Rutherford Institute notified counsel of record for both parties in this case of its intent to file this *amicus* brief, and both parties have consented to the filing of this brief.

INTRODUCTION

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4, enacted by Congress as a response to this Court's decision in *Employment Div., Department of Human Resources v. Smith*, 494 U.S. 872 (1990), sought to reinstate the requirement that the government justify the burden imposed on religious exercise by neutral laws of general applicability. Under RFRA, the government must demonstrate that a substantial burden to the exercise of religion is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(1)-(2). While this Court has held that Congress exceeded its constitutional powers in imposing this requirement on state and local governments, *City of Boerne v. Flores*, 521 U.S. 507, 529-36 (1997), the courts of appeals have upheld RFRA's constitutionality as applied to the federal government. *See, e.g.*, *Hankins v. Lyght*, 441 F.3d 96, 109 (2d Cir. 2006); *Christians v. Crystal Evangelical Free Church* (*In re Young*), 141 F.3d 854, 863 (8th Cir. 1998). The lower courts have uniformly permitted the invocation of RFRA as a defense by a religious institution or individual where the federal government is also a party to the lawsuit. The courts have disagreed, however, as to whether RFRA applies in a civil action between private parties that implicates federal law.

In this case, the U.S. Court of Appeals for the Sixth Circuit held that a private party may not invoke RFRA in a civil suit alleging trademark infringement and other violations of the Lanham Act. This unduly restrictive construction of RFRA — which is contrary to the law's language and purpose

— deprives individuals and religious institutions of an important statutory protection and warrants a review, and correction, by this Court.

SUMMARY OF THE ARGUMENT

The issue presented in the petition for certiorari warrants this Court's review. In enacting RFRA, Congress expressly stated that all federal laws of general applicability that impose a substantial burden on free exercise of religion must satisfy the "compelling government interest test." The potential imposition upon religious exercise is not decreased when the law is invoked by a private party in civil litigation. Indeed, a wide variety of private civil litigation involving federal anti-discrimination, intellectual property, or bankruptcy law presents serious risks of significantly burdening free religious exercise. This Court should intervene and clarify whether RFRA's strict scrutiny standard is available as a defense for civil litigants against this intrusion.

The availability of RFRA as a defense in private civil litigation is particularly important because existing statutory provisions or judicially crafted doctrines do not provide sufficient protection for religious exercise. The "ministerial exception," created by the courts for employment discrimination litigation, is a narrow doctrine that applies only in a limited set of circumstances. Federal intellectual property law lacks even this modest defense for instances where free exercise of religion may be burdened by a law of general applicability. Finally, even in the bankruptcy context, where Congress has enacted a law providing special accommodation for

religious exercise, only RFRA can provide protection for religious institutions facing bankruptcy. The availability of RFRA as a defense in private litigation is, therefore, an issue warranting this Court's review.

ARGUMENT

A. *The Applicability of RFRA's Strict Scrutiny Standard to Private Civil Litigation Is an Issue of Widespread Importance.*

The strict scrutiny standard of review prescribed by RFRA could serve as a powerful defense in a wide range of private litigation, ranging from employment discrimination disputes, to bankruptcy proceedings, to lawsuits over intellectual property rights. *See* Pet. at 23-24 (listing cases). This Court's intervention is necessary to establish uniformity with respect to the availability of RFRA to individuals or religious institutions forced to defend themselves against charges based on federal law.

The issue is particularly important in the context of employment disputes. Federal courts regularly entertain private civil lawsuits involving employment discrimination claims brought against religious organizations. This litigation often involves anti-discrimination claims brought by employees or former employees under Title VII of the Civil Rights Act of 1964 — ranging from allegations of racial discrimination, *see, e.g.*, *Boggan v. Miss. Conference of United Methodist Church*, 433 F. Supp. 2d 762, 763 (S.D. Miss. 2006), *aff'd*, 222 F. App'x 352 (5th Cir. 2007), to charges of gender and national origins

discrimination, *see, e.g.*, *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 700-04 (7th Cir. 2003). *See also Petruska v. Gannon Univ.*, 462 F.3d 294, 299-02 (3d Cir. 2006) (charges of gender discrimination). These lawsuits also frequently arise under the Age Discrimination in Employment Act of 1967 ("ADEA"), Pub. L. No. 90-202, 81 Stat. 602. *See, e.g.*, *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 325-26 (3d Cir. 1993) (age discrimination charges brought by a former religious school teacher); *Guinan v. Roman Catholic Archdiocese*, 42 F. Supp. 2d 849, 850 (S.D. Ind. 1998) (charges of age discrimination brought by a Catholic elementary school teacher).

Both Title VII and the ADEA are laws of general applicability that are facially neutral towards religion. As such, under this Court's decision in *Smith*, a religious organization or its officials are not relieved of their obligation to comply with these laws "on the ground that the law proscribes (or prescribes) conduct that [their] religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (internal quotation marks and citation omitted). Subsequent to *Smith*, the burden that Title VII and the ADEA may constitutionally impose on a religious organization in any specific case is no longer subject to this Court's "compelling state interest" test, even if the burden that the law places on religious practice is a substantial one. *Id.* at 886-87.

Yet, the burden that these facially neutral laws can impose on a religious organization may be considerable. The employment decisions made by a church or another religious organization often stem, at least in part, from ecclesiastical considerations. As

this Court has held, the First Amendment guarantees religious organizations the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 115 (1952); *see also* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1388-92 (1981) (the Free Exercise Clause protects religious organizations against burdens or restrictions on religion by ensuring the church's internal autonomy).[2] In anti-discrimination suits, however, the courts are often called upon to inquire whether a particular employment decision was motivated by a religious, as opposed to secular (and prohibited), purpose. *See, e.g.*, *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 169-71 (2d Cir. 1993) (permitting an inquiry into whether a Catholic parochial school's asserted religious reason for terminating a math teacher was genuine or mere pretext); *see also Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 223-24 (E.D.N.Y. 2006) (permitting, in a Title VII pregnancy claim, an inquiry into whether the

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[2] For this reason, the courts have developed the "ministerial exception" — a judicially created doctrine that generally insulates a church's employment decisions with respect to ministers and clergy from federal anti-discrimination statutes. *See, e.g.*, *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). As discussed below, *see infra* at 10-13, the ministerial exception is a doctrine of limited reach, and so cannot substitute for RFRA.

asserted religious reason for the allegedly discriminatory employment action was genuine).

The intrusion may be particularly acute where the charges contain allegations of actionable harassment under Title VII. Such statements are often made within the context of an internal church dialogue about issues involving church doctrine. *See, e.g., Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659 (10th Cir. 2002) (concluding that church officials' allegedly disparaging remarks regarding plaintiffs' sexual orientation "were part of an internal ecclesiastical dispute and dialogue protected by the First Amendment") (citations omitted). Moreover, because "[s]exual harassment claims under Title VII are directed towards conduct, mostly verbal, among employees and between employees and employers," such claims would "necessarily invite the most searching government examination of the details of what the [church employees] said to each other and in what manner." *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 803 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc).

In sum, anti-discrimination lawsuits challenging a religious organization's employment decision carry with them the potential to hinder the free exercise of religion and interfere with the religious institution's internal procedures. The regularity with which such lawsuits are brought illustrates the need for this Court's intervention to clarify whether RFRA is available as a defense in private civil actions under federal anti-discrimination law.

Another context in which civil actions between private parties implicate the free exercise of religion

is litigation arising under federal intellectual property statutes, such as the Copyright Act, 17 U.S.C §§ 101-805, or the Lanham Act, 15 U.S.C. §§ 1051-1141n. In these cases, individuals face suits for copyright infringement or trade secrets misappropriation of material, the use of which they view as integral to their religious practice. *See, e.g., Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1113-4 (9th Cir. 2000) (copyright infringement); *Urantia Found. v. Maaherra*, 895 F. Supp. 1335, 1335-36 (D. Ariz. 1995) (copyright and trademark infringement); *Bridge Publ'ns, Inc. v. Vien*, 827 F. Supp. 629, 635 (S.D. Cal. 1993) (copyright infringement and trade secrets misappropriation).[3] RFRA — if available as a defense to federal intellectual property laws enforced by private parties in civil actions — would provide much-needed constitutional protection to people of faith who are accused of infringing upon intellectual property rights.

A final area of tension between the free exercise of religion and federal laws of general applicability is the bankruptcy proceedings. When a religious organization files for bankruptcy, it becomes subject to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1330. These provisions do not contain any special accommodations or safeguards for religious institutions or individuals. *See, e.g., In re Roman Catholic Archbishop of Portland*, 335 B.R. 842, 862

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[3] Although *Vien* was decided several months prior to RFRA's enactment, it illustrates the type of lawsuits where the federal intellectual property law comes into tension with the free exercise of religion. *See infra* at 14-15.

(Bankr. D. Or. 2005) (the Bankruptcy Code requires an application of "neutral secular principles of law to determin[e a church's] rights in property"). Yet, a bankruptcy proceeding can potentially lead to a religious organization's loss of its property and other assets, with the consequent loss of the ability to worship for the organization's members.

The variety of contexts in which federal laws of general applicability are invoked in private civil litigation against religious institutions or individuals exercising their religious rights demonstrates the importance of having this Court provide definitive guidance as to whether RFRA's strict scrutiny standard may be used as a defense in this litigation.

B. *The Existing Statutory Defenses and Judicial Doctrines Are Insufficient to Protect Rights of Free Religious Exercise.*

In all of the above areas, existing defenses and doctrines designed to guard against unwarranted state encroachment on religious liberty are insufficient to provide meaningful protection for free exercise of religious rights that may be significantly burdened by neutral laws of general applicability.

1. The "Ministerial Exception" in the Employment Discrimination Context Is a Narrow Exception that Provides Only Limited Protection.

In the area of employment discrimination, courts of appeals have developed a so-called "ministerial exception" — a judicially created doctrine that generally proscribes the application of employment discrimination statutes to ministers and other clergy.

See, e.g., *McClure*, 460 F.2d at 558-61 (articulating the ministerial exception in the context of a Title VII discrimination claim); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039-41 (7th Cir. 2006) (applying ministerial exception to a claim under the ADEA); *Starkman v. Evans*, 198 F.3d 173, 174-77 (5th Cir. 1999) (applying ministerial exception to a claim under the Americans with Disabilities Act). The ministerial exception protects the free exercise rights of religious organizations by precluding courts from adjudicating anti-discrimination claims brought by members of the clergy against their religious employers. *See, e.g.*, *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996).

The ministerial exception, however, is narrow in scope. It is a "limited" exception that applies only to "employment discrimination suits brought by clergy members or other employees serving primarily religious roles." *Hankins*, 441 F.3d at 118 n.13 (Sotomayor, J., dissenting) (citing cases); *see also EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000) (the ministerial exception's "range of application is limited to spiritual functions" of the positions in question); *Geary*, 7 F.3d at 331 (the ministerial exception is limited to cases in which employees perform duties of a religious nature).[4]

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[4] Similarly, the "church autonomy doctrine," which "extends beyond the selection of clergy to other internal church matters," "does not apply to purely secular decisions," but only to decisions "'rooted in religious belief.'" *Bryce*, 289 F.3d at 657 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

Indeed, as the Sixth Circuit acknowledged below, "[t]he ministerial exception is a highly circumscribed doctrine." Pet. App. at 14a.

The ministerial exception does not shield a religious organization as employer from the laws of general applicability relating to lay employees that do not perform religious functions. *See, e.g.*, *Bollard v. Cal. Province of Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171-72 (4th Cir. 1985) (citing cases); *DeMarco*, 4 F.3d at 171. Consequently, "courts consistently have subjected the personnel decisions of various religious organizations to statutory scrutiny where the duties of the employees were not of a religious nature." *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363 n.3 (8th Cir. 1991) (citing cases).

Indeed, on numerous occasions courts have held the ministerial exception inapplicable to religious institutions' employees who were not performing religious functions, and have permitted lawsuits against the institution to proceed. *See, e.g.*, *DeMarco*, 4 F.3d at 171-72 (a math teacher in a Catholic parochial school); *Geary*, 7 F.3d at 328-31 (a lay teacher at a religious school); *Patsakis v. Greek Orthodox Archdiocese of Am.*, 339 F. Supp. 2d 689, 694-97 (W.D. Pa. 2004) (a Greek Orthodox diocesan registrar); *Stouch v. Bros. of Order of Hermits of St. Augustine*, 836 F. Supp. 1134, 1144 (E.D. Pa. 1993) (a chef at an Augustine monastery).

The personnel decision made with respect to a lay employee may, nonetheless, be based on religious considerations. The religious institution may counter the allegations of discrimination by asserting a

specific religious reason for the adverse employment action. Thus, in *DeMarco* a Catholic school argued that a terminated math teacher — whom the Second Circuit found to be a lay employee not encompassed by the ministerial exception — "was dismissed for reasons unrelated to his age, including failure to begin his classes with prayer and failure to attend Mass with his students." 4 F.3d at 168. The Second Circuit nevertheless reversed a grant of summary judgment for the school, concluding that the district court could "focus the trial upon whether DeMarco was fired because of his age or because of failure to perform religious duties," and that such inquiry could be conducted "without putting into issue the validity or truthfulness of Catholic religious teaching." *Id.* at 172. *See also Geary*, 7 F.3d at 329-31 (reversing a summary judgment for a church-operated elementary school's termination of a lay teacher where a disputed issue existed as to whether the termination was motivated by a religious reason); *Redhead*, 440 F. Supp. 2d at 222-24 (refusing summary judgment because a disputed issue existed as to whether the Seventh-day Adventist Church terminated a lay teacher "because of her sex and pregnancy or because of an evenly applied religious and moral code"); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 348-50 (E.D.N.Y. 1998) (same).

This type of invasive inquiry, however, could constitute a significant and burdensome intrusion upon the religious institution's exercise of religious expression. *See, e.g.*, *Rayburn*, 772 F.2d at 1171 ("[a] Title VII action is potentially a lengthy proceeding [where c]hurch personnel and records would inevitably become subject to subpoena, discovery, cross examination, the full panoply of legal process

designed to probe the mind of the church"). Quite often, "[s]uch an intrusion — even if not clumsy — will necessarily trespass upon ground that belongs to the Church." *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 975 (2004) (Trott, J., dissenting). The chilling effect of this burden on institutions of religion and their right of free exercise may be considerable. "[C]hurches will have to change their own conduct, rules, and theological doctrine to avoid coming into contact with the apparatus of the state." *Elvig*, 397 F.3d at 803 (Kleinfeld, J., dissenting from denial of rehearing en banc). In these instances — where the ministerial exception would not apply — RFRA's strict scrutiny requirement would be the only substantive protection available to a religious institution.[5]

2. The Existing Defenses Under Copyright and Trademark Law Do Not Provide Any Special Protection for Religious Exercise.

Unlike employment law, which has a developed a judicially crafted doctrine addressing free exercise rights, federal intellectual property law provides no special protection for an individual's (or an

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[5] While RFRA would supply such protection, it would not necessarily foreclose every anti-discrimination suit brought by a church employee. A court may well conclude, on the circumstances of a particular case and after applying the compelling governmental interest test prescribed by RFRA, that "the Title VII framework is the least restrictive means of furthering this compelling interest." *Redhead*, 440 F. Supp. 2d at 221-22 (permitting a pregnancy discrimination lawsuit after rejecting the ministerial exception and applying RFRA).

institution's) exercise of religious rights. While copyright and trademark law contains a range of defenses — notably, the right of fair use in the copyright context, 11 U.S.C. § 107, and the prior use doctrine in the trademark context, 15 U.S.C. § 1052(d) — these defenses are themselves religion-neutral. As such, they do not provide any accommodation for instances when, as in the present case, the application of the copyright and trademark law burdens religious exercise. RFRA — if available as a defense to federal laws enforced by private parties in civil actions — would provide a much-needed constitutional protection to persons and institutions of faith accused of infringing intellectual property rights.

Vien, 827 F. Supp. 629, which was decided several months prior to RFRA's enactment, illustrates vividly the need for RFRA's protections in the intellectual property context. In *Vien*, the Church of Scientology sued the defendant, a teacher, for copyright infringement and trade secrets misappropriation stemming from the defendant's use of the church's copyrighted materials in a course she independently offered. 827 F. Supp. at 632-33. The defendant countered that her use of the copyrighted material was integral to her practice of religion, and that the enforcement of federal copyright law imposed a burden on her free exercise rights. *Id.* at 635.

In the absence of RFRA, the only defense available to the defendant in *Vien* was the fair use doctrine. This doctrine provides that "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or

research, is not an infringement of copyright." 17 U.S.C. § 107. Having considered the applicable statutory factors, the district court held that the defendant was not entitled to fair use protection. *Vien*, 827 F. Supp. at 636. Rejecting the defendant's First Amendment defense, the district court observed that "neutral application of copyright and trade secret law to religious works does not offend the constitution." *Id.* at 635.

Court decisions rendered after RFRA's enactment illustrate the difference that application of RFRA's strict scrutiny analysis can bring to cases involving federal intellectual property laws. In *Worldwide Church of God*, 227 F.3d 1110, the Ninth Circuit considered whether RFRA could serve as a defense to a suit for copyright infringement where the defendant break-away church claimed that the copyrighted work was central to its religious practice. 227 F.3d at 1113-14. Observing that its analysis of the fair use defense was not affected "by the religious nature of [the] activity," *id.* at 1115, the Ninth Circuit concluded that the fair use doctrine did not protect the church's use of the copyrighted material, *id.* at 1120.

The Ninth Circuit then turned to the question of whether RFRA protected such use. The court of appeals, declining to decide whether RFRA applied to intellectual property disputes, held that the break-away church, in any event, had not "demonstrate[d] that the copyright laws subject[ed] it to a substantial burden in the exercise of its religion," since the requirement of paying for the use of copyrighted material did not amount to such a burden. *Id.* at 1121. In reaching this conclusion, the court noted

"the absence of evidence that [the church's] needs could not reasonably be accommodated under the copyright laws." *Id.*[6] Thus, if obtaining permission to legally distribute copies of the copyright work was impossible or cost-prohibitive, the "compelling government interest" analysis prescribed by RFRA may well have led to a different outcome. RFRA would offer protections for religious exercise that neutral defense doctrines, such as fair use, would not.

Indeed, the decision below presents a compelling example of how federal intellectual property laws of general applicability may burden free exercise rights. The Sixth Circuit acknowledged that "no one has questioned the sincerity of [Petitioner]'s belief that God requires him to continue his infringing use of plaintiff's marks" and observed, moreover, that "[b]eing compelled to stop could substantially burden his religious exercise." Pet. App. at 16a. Because the court of appeals refused to apply RFRA, however, *see* Pet. App. at 14a-21a, its analysis was limited to an inquiry into whether Respondents' name ("Seventh-day Adventism") was a generic term that cannot be trademarked, Pet. App. at 21a-31a. As a defense of general applicability, the "generic term" defense

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[6] Similarly, the court in *Urantia Foundation v. Maaherra*, 895 F. Supp. 1335 (D. Ariz. 1995), expressly applied RFRA's compelling interest test to a civil action to enjoin the defendant from infringing copyright and trademarks, and concluded that the test was satisfied. 895 F. Supp. at 1336-37. Just as in the employment context, RFRA's strict scrutiny analysis will not necessarily invalidate the application of a neutral federal law of general applicability; it will simply require a court to undertake an analysis that is sensitive to the burden that the law places on religious exercise.

afforded no protection to Petitioner's free exercise rights. *See* Pet. App. at 29a-30a.

3. The Existing Bankruptcy Law Does Not Provide Adequate Protection for a Religious Organization Filing for Bankruptcy.

Since its passage, courts have inconsistently applied RFRA in bankruptcy proceedings involving non-profit religious organizations. Congress partially remedied this problem when it enacted the Religious Liberty and Charitable Donation Protection Act of 1998 ("RLCDPA"), Pub. L. No. 105-183, 112 Stat. 517. RLCDPA, however, nevertheless leaves religious institutions with inadequate protection in bankruptcy proceedings — protection that only RFRA's strict scrutiny standard can provide.

Prior to the passage of RLCDPA, courts disagreed over whether, in the context of an individual filing for bankruptcy, a trustee could avoid the individual's donations to a religious organization under certain conditions. *See* 11 U.S.C. § 548(a)(2) (now renumbered as 11 U.S.C. § 548(a)(1)). Some courts held that RFRA prevented a trustee from avoiding transfers made to churches and other religious organizations. *See, e.g.*, *In re Hodge*, 220 B.R. 386, 393 (D. Idaho 1998) (denying a trustee's avoidance claim on the grounds that "the application of the avoidance statutes to the [debtors] 'substantially burdens' the free exercise of their religious beliefs, and that although the avoidance statutes may be justified by a 'compelling governmental interest,' they are not the 'least restrictive means' of furthering that interest"); *see also In re Young*, 141 F.3d at 857, 863. Other courts, however, permitted trustees to recover

previous donations for the bankruptcy estate, finding that the avoidance statute did not run afoul of RFRA because it did not substantially burden the debtor. *In re Newman,* 203 B.R. 468, 477 (D. Kan. 1996); *In re Bloch*, 207 B.R. 944, 951 (D. Colo. 1997).

In 1998, RLCDPA restored uniformity to the treatment of religious donations, and provided religious institutions with specific protections with respect to these donations. RLCDPA created a safe harbor for qualifying religious contributions of up to fifteen percent of a debtor's gross income, or more if consistent with a debtor's previous giving pattern. *See* 11 U.S.C. §§ 544(b)(2), 548(a)(2), 1325(b)(2)(A)(ii); *see also In re Lewis*, 401 B.R. 431, 437 (Bankr. C.D. Cal. 2009). RLCDPA thus provides protection to religious organizations that are the recipients of debtor donations.[7]

While RLCDPA protects the assets of a religious organization when a contributing debtor files for bankruptcy, no provision of the Bankruptcy Code (aside from RFRA, which courts view as an amendment of the Code, *see In re Young*, 141 F.3d at

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[7] RLCDPA contains some exceptions, designed to prevent a debtor from circumventing the Bankruptcy Code. Thus, RLCDPA does not shield donations that are made in bad faith, *In re Jackson*, 249 B.R. 373, 377-78 (Bankr. D.N.J. 2000), donations that are considered a substantial abuse of the Bankruptcy Code, *In re Smihula*, 234 B.R. 240, 243-44 (Bankr. D. R.I. 1999), or payments that are not actually donations at all, *Watson v. Boyajian* (*In re Watson*), 309 B.R. 652, 662-63 (B.A.P. 1st Cir. 2004) (tuition for a private religious school is not protected by the RLCDPA), *aff'd*, 403 F.3d 1 (1st Cir. 2005), *superseded by statute*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 51.

861), protects a religious organization if the organization itself files for bankruptcy. A court's refusal to apply RFRA in this context could result in a religious organization's loss of its property and other assets, with the resulting loss of its members' ability to worship. Application of RFRA is therefore a necessary safeguard for religious organizations involved in bankruptcy proceedings.

Thus, the Bankruptcy Court for the District of Oregon has recognized that RFRA should apply in a bankruptcy proceeding. *In re Roman Catholic Archbishop of Portland*, 335 B.R. at 862-63. The bankruptcy court examined, on summary judgment, whether the debtor, the Catholic Archdiocese of Portland, had to include in its estate property held in trust for member parishes and schools, and whether the trustee could avoid parishioners' interests in the parish property. The court concluded that avoiding parishioners' unrecorded beneficial interests in the property under 11 U.S.C. § 544(a)(3) could potentially impose a substantial burden on the free exercise of religion, because the requisite sale of churches and schools could "leave[] the parishioners and school children with no place to worship and study." 335 B.R. at 864. The court also rejected the argument that there was a compelling governmental interest in applying section 544(a)(3), "if doing so would impose a substantial burden on the exercise of religion." *Id.*

By contrast, other courts have failed to apply or even to address the applicability of the RFRA to bankruptcy proceedings. *See, e.g., In re Faith Missionary Baptist Church*, 174 B.R. 454, 466-69 (Bankr. E.D. Tex. 1994) (allowing seizure of church

funds to satisfy individual alter ego's tax liens without application of RFRA).

The importance of RFRA is evident in light of the unique circumstances of a debtor church. Corporate debtors have the ability to reorganize in bankruptcy rather than liquidate, so as to maximize their value to creditors. While a church may seek the same relief, it would face greater difficulties than a for-profit corporation in showing that an organization supported largely (if not entirely) through donations will be more valuable if allowed to continue to operate. *See Provident Mut. Life Ins. Co. v. Univ. Evangelical Lutheran Church of Seattle*, 90 F.2d 992, 995 (9th Cir. 1937) (refusing to affirm a church reorganization plan as largely a "visionary and hopeless scheme for financial rehabilitation"); *see also In re Miracle of Church in God in Christ*, 119 B.R. 308, 309-10 (Bankr. M.D. Fla. 1990). RFRA therefore is particularly important, because it would provide religious organizations with protection where traditional bankruptcy law may not.

In light of the drastic impact that bankruptcy proceedings can have on the ability to worship, courts should apply the RFRA to all bankruptcy disputes involving religious organizations. This does not mean that a court should *per se* allow such organizations additional protection, but rather that a court should evaluate the impending action with strict scrutiny. *See* 42 U.S.C. § 2000bb–1(a)-(b). In this way, RFRA would ensure that burdensome federal laws are closely scrutinized for their impact on religious exercise, while not precluding unduly the application of federal law where justified by the compelling governmental interest.

CONCLUSION

The petition for certiorari should be granted.

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